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THE
ALL INDIA REPORTER
1914

PRIVY COUNCIL SECTION

CONTAINING
FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF
THE PRIVY COUNCIL REPORTED IN
LAW REPORTS 41 INDIAN APPEALS
AND ALL THE JOURNALS PUBLISHED IN INDIA AND BURMA,
AND EXTRA JUDGMENTS INCLUDING THOSE ON
APPEAL FROM THE COLONIES

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COMPARATIVE TABLES

(PARALLEL REFERENCES.)

Hints for the use of the following Tables :—

TABLE Nos. I & II.—This Table shows serially the pages of REPORTS, JOURNALS and PERIODICALS for the year 1914 with corresponding references of the ALL INDIA REPORTER.

TABLE No. III.—This Table is the converse of the **First and Second Tables.** It shows serially the pages of the ALL INDIA REPORTER, with corresponding references of all JOURNALS.

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N.B.—Column No. 1 denotes pages of other JOURNALS.

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THE ALL INDIA REPORTER 1914

PRIVY COUNCIL.

A. I. R. 1914 Privy Council. (FROM NAGPUR.)

29th June, 1914.

LORD MOULTON, LORD PARKER OF
WADDINGTON, SIR JOHN EDGE AND
MR. AMEER ALI.

Ramchandra and others—Appellants

v.

Vinayak and another—Respondents.

On appeal from the Court of the Judicial Commissioner, Central Provinces.

(a) *Hindu Law—Succession—Mitakshara—Bandhus are Bhinnagotra Sapindas—Bandhus must be within five degrees from the common ancestor and mutuality of sapinda relationship must exist.*

The term "Bandhu" as used in the Mitakshara is technical in its significance, (*i.e.*) signifies Bhinnagotra Sapindas (*i.e.*) persons who are related to the propositus through one or more females. The two tests for heritability among bandhus are (1) that the sapinda relationship on which the heritable right of collaterals is founded ceases with the fifth degree from the common ancestor, (2) that in order to entitle a man to succeed to the inheritance of another, he must be so related to the latter that they are sapindas of each other. (Texts and case-law exhaustively discussed).

(b) *Hindu Law—Rules of construction have to be deduced from Hindu Law texts, and not from abstract reasonings—Words will have same meaning throughout a work.*

Hindu Law contains its own principles of exposition and questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of Law, but must depend for their decisions on the rules and doctrines enunciated by its own law-givers and recognised expounders. [P. 3, C. 2.]

It is a well understood rule of construction amongst the authors of the Institutes of Hindu Law, that the same word must be taken to have been used in one and the same sense throughout a work unless the contrary is expressly indicated.

(c) *Hindu Law—Sapinda relationship is based on community of blood—Limitation on Sapinda relationship, apply as much to inheritance as to marriage etc.*

It is now recognized that the true theory of *Sapinda* relationship propounded by Vignaneswara was based on community of blood. [P. 3, C. 1.]

The limitations of Vignaneswara on *Sapinda* relationship are not merely confined to marriage etc., but relate equally to inheritance. [P. 5, C. 2.]

(d) *Hindu Law—Enumeration of Bandhus in Mitakshara, is merely illustrative of the classes.*

The enumeration of the *Bandhus* in the Mitakshara is only illustrative of the proposition that there are three classes of Hindus. *Obiter* this does not mean that the classes can be added to.

DeGruyther and *J. M. Parikh*—for Appellants.

Ross and *G. R. Lowndes*—for Respds.

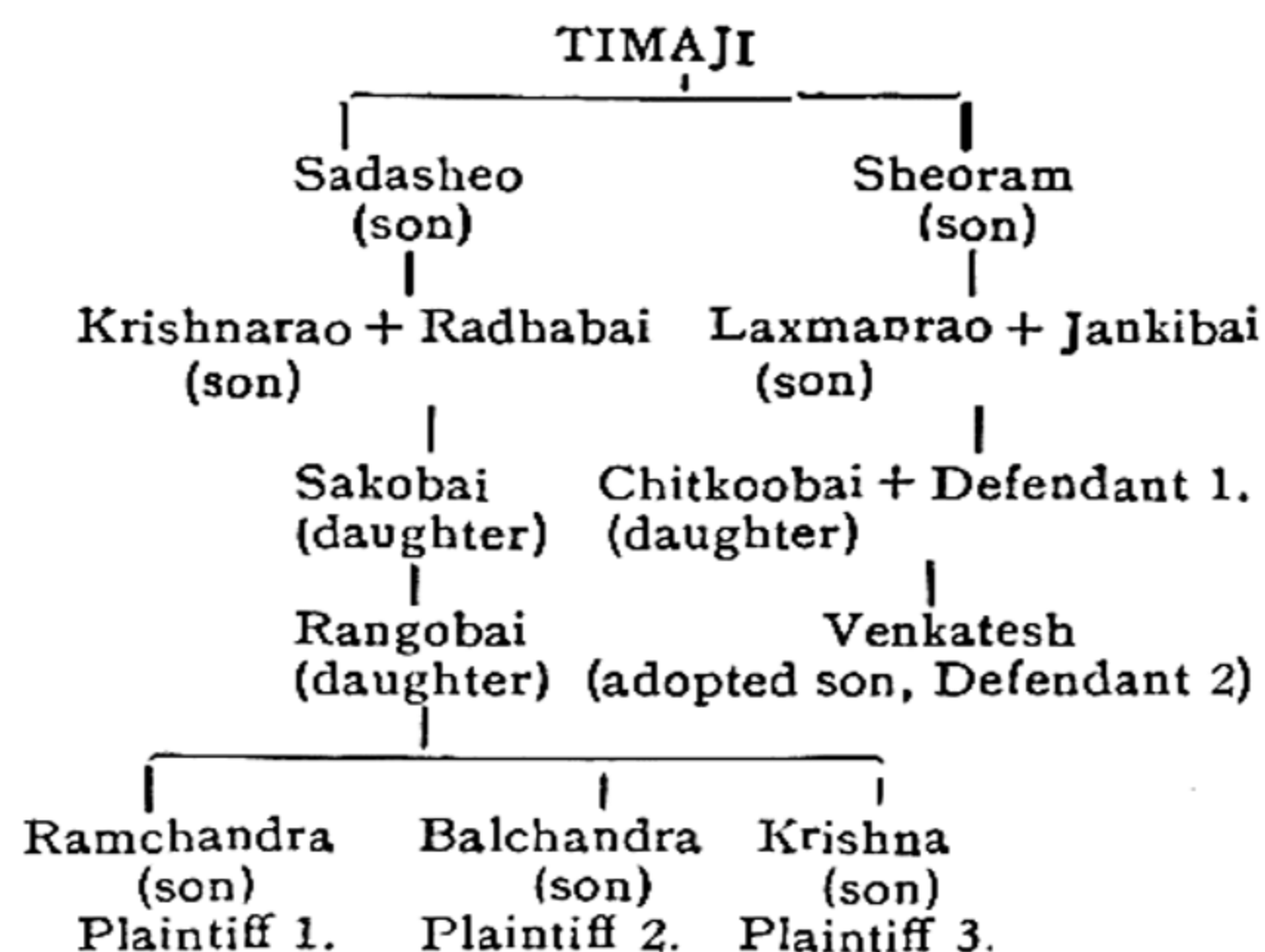
Mr. Ameer Ali:—The suit that has given rise to the present appeal was brought by the plaintiffs in the Court of the District Judge of Balaghat, in the Central Provinces of India, for possession of certain properties which originally belonged to one Laxmanrao, whose next-of-kin or *bandhus* they claim to be under the law of the Mitakshara.

Laxmanrao died in 1851, leaving him surviving his widow Jankibai and a daughter Chitkoobai, both since deceased. The defendant Venkatesh is Chitkoobai's husband. On Laxmanrao's death without male issue his inheritance devolved on Jankibai. She held possession of the properties in suit as a Hindu widow until her death in 1883, when Chitkoobai succeeded to her father's estate. She died on the 7th of May, 1894, leaving the first defendant, her husband. The second defendant is a son adopted by him after Chitkoobai's decease.

The present action was not instituted until March 1906. The plaintiff's claim that the inheritance to Laxmanrao opened to them on the death of Chitkoobai, and that they are entitled to recover possession of the properties from the

defendants who have no right of succession to Laxmanrao's estate.

The following genealogical table will explain the relative position of the parties and the exact nature of the claim:—



The defendants resisted the claim mainly on two grounds; they alleged, *firstly*, that the ancestors of the parties had migrated to the Central Provinces from Asirgarh, situated within the Mahratta country, where the law in force conferred on the daughter succeeding to her father's inheritance an absolute estate descendible to her own heirs; that the family of Timaji was still subject to that law, and that accordingly the estate which Chitkoobai had acquired passed on her death without issue to the first defendant, her husband. In the second place, they urged that the plaintiffs had no heritable right or interest in Laxmanrao's estate as they did not come within the category of *bandhus* entitled to succeed to his inheritance.

The Courts in India have overruled the first plea, and have held that on settling in the Central Provinces the family of Timaji adopted the *lex loci* and are now governed by the rules of the Mitakshara generally in force in that province.

But they have given effect to the defendants' second contention; they have held in substance that the Mitakshara lays down a well-defined limit where the kinship entitling *bandhus* to succession ceases, and that the plaintiffs are beyond that limit. They have accordingly dismissed the suit.

The plaintiffs have appealed to His Majesty in Council, and the case has on both sides been argued with considerable ability and learning.

In dealing with the arguments addressed to this Board on behalf of the appellants their Lordships cannot help noticing one circumstance, *viz.*, that in the Courts below, so far as appears from the record it was not denied that there was a limit to the heritable right of *bandhus*, the only contention being whether it was seven degrees from the common ancestor or five as urged by the defendants. Before this Board, on the other hand, it has been strenuously contended that there is no limit to the succession of *bandhus*. Their Lordships do not wish, however, to draw any inference from this change of ground, for what they have to determine in this appeal is whether the term *bandhu* is to be construed, as the plaintiffs argue, in the broadest sense, or whether it is subject to any limitation, and in the latter case what that limitation is according to the law by which the parties are governed.

In the Hindu law the succession of heirs individually specified does not present much difficulty; the controversies and divergences amongst Hindu lawyers are chiefly concerned with collateral succession. Manu, the ancient sage, whose identity is lost in the midst of ages, but whose word is regarded as divine, after giving the rules regarding the succession of lineal male descendants and male ascendants, declares: "The property of a near *sapinda* shall be that of a near *sapinda*." [Chapter IX, V. 187. This is the translation given by Mr. Justice Banerjee in *Babu Lal v. Nanku Ram* (1)] Sir William Jones in his translation of Manu's Institutes has rendered the passage somewhat differently, but for the purposes of the present judgment it is of little importance.

It is upon this enunciation that all the schools base the right of collaterals to succeed to the inheritance of a deceased person. This refers only to the succession of one male to another, for females inherit by express rules. The right of collaterals, therefore, is dependent on the existence of the *sapinda* relationship between the *propositus* and the claimant. The contest that has arisen in the several schools is with regard to the meaning to be attached to the term *sapinda*, in other words, what does *sapinda* relationship imply, and what is the true test for deter-

mining whether a particular person is a *sapinda* to the deceased or not? Jimutavahana, the author of the Dayabhaga, the guiding authority in the Bengal or Gauriya school, considers it to mean "community in the offering of funeral oblations." He draws his argument from the word *pinda*, which literally signifies a ball of rice offered at the performance of obsequial rites. Mr. Lowndes is probably right, that in early times the right of inheritance was dependent on the right to participate in the offering of funeral oblations, a doctrine which is part and parcel of the Dayabhaga rules.

But it is also clear that Vijnaneswara, the author of the Mitakshara, who appears to have flourished towards the end of the 11th and the beginning of the 12th century of the Christian era, some five centuries before Jimutavahana, abandoned the ancient doctrine, and construed *sapinda* relationship to arise from community of blood, or to use the quaint language of Hindu writers, "community of particles of the same body." His legal conception in this respect will appear clearly from a passage of the Mitakshara, Book I., chapter on Marriage, not included in Mr. Colebrooke's translation. To this passage their Lordships will have to refer later on in the course of this judgment.

Messrs. West and Buhler in their "Digest of the Hindu Law," whose merit and authority have been recognised by eminent Hindu Lawyers, have examined in detail the doctrines of the Mitakshara on this point, and their general conclusion as to Vijnaneswara's legal conception of *sapinda* relationship is summed up in the following words, that he based it "not on the presentation of funeral oblations but on descent from a common ancestor, and in the case of females also on marriage with descendants from a common ancestor." Mr. Colebrooke in his rendering of the Mitakshara has paraphrased *sapinda* as a relation "connected by funeral oblations," which resulted in virtually obliterating one of the main distinctions between the Benares and the Bengal schools. But it is now recognized that his paraphrase was erroneous, and that the true theory of *sapinda* relationship propounded by Vijnaneswara was based on community of blood. It is on this theory of Vijnaneswara that the learned counsel for the appellants place

their chief reliance. The plaintiffs, it is urged, are unquestionably related to Laxmanrao by tie of blood: they are, therefore, his *sapindas*, and consequently, in the absence of near kinsmen, entitled to his inheritance. It is to be remarked, as has been observed in previous cases before this Board, that the Hindu law contains its own principles of exposition, and that questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own law-givers and recognized expounders.

The Mitakshara purports to be a commentary on the work of Yajnavalkya, who is supposed to have lived about the second century of the Christian era, about a thousand years before Vijnaneswara. In the Mitakshara he is spoken of in terms of deep veneration: and his doctrines, developed by Vijnaneswara, certainly show a marked advance over the legal conceptions of his predecessors. So far as their Lordships have been able to ascertain, the *bandhus*, or distant kinsmen related to the deceased through females, make their appearance as heirs, first in Yajnavalkya's enunciations. Mr. Borrodaile, in the first volume of his Reports of the Bombay Sudder Dewanny Adawlut Decisions, has given a translation of the Index to the Mitakshara, which furnishes a general idea of the scheme of this great and important work of Hindu law. It consists of two books; the first called the *Acharadhyaya* "On Established Rules of Conduct or Ordinances"; the second the *Vyavaharadhyaya* "On the Laws and Customs of the People." Both books, however, are so inter-related that the rules of the one can scarcely be construed without reference to the other.

It is to be noted that in the Vyavastha Chandrika, the Book on "Established Rules of Conduct" is cited as the *Achara Adhyaya* ("Chapter or Book on Established Rules of Conduct"), whilst in the decisions of the Indian Courts and recent works on Hindu Law, it is referred to under the name of the *Achara Kanda* ("Division or Part relating to Established Rules of Conduct").

In the third chapter of the *Achara Kanda*, Vijnaneswara lays down the rules relating to the forbidden degrees of kindred,

and here he defines his theory of relationship. A translation of this passage is to be found in the "Digest of Hindu Law", by West and Buhler, Vol. I, p. 120, and also in the judgment of the Bombay High Court in *Lallubhai v. Mankuvarbai* (2) which came on appeal to Her Majesty in Council, and was affirmed by this Board (3).

That passage runs thus:—

"He should marry a girl who is non-sapinda (with himself). She is called his sapinda who has (particles of) the body (of some ancestor, &c.) in common (with him). Non-sapinda means not his sapinda. Such a one (he should marry). Sapinda relationship arises between two people through their being connected by particles of one body. Thus the son stands in sapinda relationship to his father because of particles of his father's body having entered (his). In like manner (stands the grandson in sapinda relationship) to his paternal grandfather and the rest, because through his father particles of his (grandfather's) body have entered into (his own). Just so is (the son a sapinda relation) of his mother, because particles of his mother's body have entered (into his). Likewise (the grandson stands in sapinda relationship) to his maternal grandfather and the rest through his mother. So also (is the nephew) a sapinda relation of his maternal aunts and uncles, and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs); likewise (does he stand in sapinda-relationship) with paternal uncles and aunts, and the rest. So also the wife and the husband (are sapinda-relations to each other) because they together beget one body (the son). In like manner brothers' wives also are (sapinda-relations to each other), because they produce one body (the son), with those (severally) who have sprung from one body (*i.e.*, because they bring forth sons by their union with the offspring of one person, and thus their husband's father is the common bond which connects them). Therefore one ought to know that wherever the word sapinda is used, there exists (between the persons to whom it is applied) a connection with one body, either immediately or by descent."

Then after refuting certain objections to his explanation of the word *sapinda*, Vijnaneswara proceeds thus:—

"In the explanation of the word 'a sapindam' (non sapinda, verse 52), it has been said that sapinda-relation arises from the circumstance that particles of one body have entered into (the bodies of the persons thus related) either immediately or through (transmission by) descent. But inasmuch as (this definition) would be too wide, since such a relationship exists in the eternal circle of births, in some manner or other, between all men, therefore the author (Yajnavalkya) says:—

Verse 53: "After the fifth ancestor on the mother's and after the seventh on the

father's side"—"On the mother's side in the mother's line after the fifth, on the father's side in the father's line, after the seventh (ancestor) the sapinda-relationship ceases; these latter two words must be understood; and therefore the word sapinda which on account of its (etymological) import (connected by having in common) particles (of one body) would apply to all men, is restricted in its signification, just as the word *punkaja* (which etymologically means "growing in the mud," and therefore would apply to all plants growing in the mud, designates the lotus only) and the like; and thus the six descendants, beginning with the son, and one's self (counted) as the seventh (in each case), are sapinda-relations." (West and Buhler Vol. I, p. 120).

The rendering of the above passages by Pandit Rajkumar Sarvadhikari though apparently more free is certainly instructive and interesting, and deserves quotation as showing what a learned Hindu scholar considered was in the mind of Vijnaneswara when defining the word *sapinda*.

"The Mitakshara then explains the following words in the next verse of Yajnavalkya, beyond the fifth, and seventh degrees on the mother's side and the father's side respectively."

"It has been already explained, that the relation of sapinda exists by reason of the connection of the parts of the same body, both directly and indirectly. But such a relationship is possible everywhere, in some way or other, between all men in this wide, wide world without a beginning. So the definition would be too wide. It is for this reason that the sage limits it thus, 'Beyond the fifth, etc.'

"The meaning is 'on the mother's side', *i.e.*, in the line of the mother, after the fifth degree; 'on the father's side', *i.e.*, in the line of the father, after the seventh degree, the relation of sapinda ceases.

"Although the word *sapinda*, therefore, may be applied in its etymological sense almost to all men, it is, there can be no doubt, limited in its signification to certain definite individuals; just as the word *mud-born* is applied only to a lotus.

"Thus the father and the other ascendants are six sapindas; and the son and the other descendants are six; and the man himself is seventh. In case of the division of a line also, the enumeration should be made until the seventh degree, commencing from whence the direction of the line changes. This rule should be applied in every case." [Sarvadhikari's Tagore Law Lectures, page 603.]

Their Lordships have no manner of doubt that in the passages quoted above, Vijnaneswara was laying down rules for the limitation of *sapinda* relationship generally.

It has been suggested in argument that this limitation is with regard to marriage only; that it defines the prohibited degrees within which a man cannot marry. A similar contention was put forward in

(2) [1876] 2 Bom. 388.

(3) (1880) 5 Bom. 110=7 I.A. 212=7 C.L.R. 445 (P.C.).

Lallubhai v. Mankuvarbhai (2). The observations on this point of the learned Judges, one of whom was the distinguished jurist, Mr. Justice West (co-author of the Digest, and afterwards Sir Raymond West) appear to their Lordships as extremely apposite to the present case.

Chief Justice Westropp in that case, at p. 426, said as follows:—

"It has been contended for the plaintiffs that in the above extracts from the *Acharya Kanda* and the *Sanskara Mayukha* the respective authors were dealing with *sapinda* relationship in its ceremonial aspect only, and that, when they wrote upon *sapinda* relationship with reference to inheritance, they may be regarded as viewing *sapinda*-relationship in the same light as the author of the *Dayabhaga* and certain other commentators on Hindu Law. But we think that the burden rests upon the plaintiffs to show that *Vijnaneswara* and *Nilakantha* regarded *sapinda*-relationship as resting on a different basis for the purpose of inheritance from that on which, dogmatically perhaps, but most distinctly, the one has placed it in the *Acharya Kanda* and the other in the *Sanskara Mayukha*. We do not think that the learned counsel for the plaintiffs have given any good reason for assuming that the authors intended to make any such difference, nor is it likely that they did.

"The religious and ceremonial law of the Hindus as prevailing amongst castes, or in particular localities, is generally speaking, almost inseparably blended with their law of succession in the same castes or localities, an opposite condition being exceptional."

As a matter of fact, as Messrs. West and Buhler point out, *Vijnaneswara* expressly says "wherever the word *sapinda* is used there exists (between the persons to whom it is applicable) a connection with one body either immediately or by descent."

In *Umaid Bahadur v. Udoi Chand* (4) the learned Judges of the Full Bench (one of whom was a Hindu Judge of great eminence) express themselves on this point in the following terms:—

"Having taken great pains in accurately defining the word *sapinda* in the beginning of his work, and having said in clear words in the passage in question that 'one ought to know that wherever the word *sapinda* is used there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent, it is hardly reasonable to suppose that the author used the word in another part of the same work in a different sense. It is a well understood rule of construction amongst the authors of the Institutes of Hindu Law, that the same word must be taken to have been used in one and the same sense throughout a work unless the contrary is expressly indicated."

(4) [1880] 6 Cal. 119=6 C. L. R., 500=5 Jur. 585 (F.B.)

Nor have the learned counsel for the appellants been in a position in this case to refer to any authority excepting one, which their Lordships will notice later on, in support of their proposition that the limitations of *Vijnaneswara* on *sapinda* relationship are confined to marriage, impurity, and exequial rites, and do not relate to inheritance.

The law of inheritance in the *Mitakshara* translated by Mr. Colebrooke, occurs in Book II, and forms Chapter VI, of that part of the work. It is entitled "*Dayavibhaga*," or "partition of heritage." It is unnecessary to refer to Chapter I, of Mr. Colebrooke's translation, or to the earlier sections of Chapter II, as they deal with subjects which do not come within the purview of this judgment. It is with Sections 5, 6 and 7, of Chapter II that their Lordships are principally concerned. The rendering of the word *sapinda* as "relations connected by funeral oblations" runs throughout Mr. Colebrooke's translation. His arrangement of the matter is also different from the original where the subject of inheritance appears to be dealt with in a consecutive form in Chapter VI.

Mr. Colebrooke has split it up into two chapters, divided into sections. (This circumstance is noticed in the Bombay judgment.) Section 5, Chapter II, (in Mr. Colebrooke's Translation), deals with the succession of the *gotraja* on failure of "brother's sons." Although *gotraja* is explained by the term *gentiles* borrowed from the Roman system, to which no doubt the Hindu system bears a remarkable analogy, it would be more convenient to adhere to the definition given in the *Mitakshara* itself. Omitting the English equivalents introduced into the translation, and retaining the Sanskrit expressions, the paragraphs run as follows:—

"3 On failure of the paternal grandmother, *gotraja-sapindas*, namely, the paternal grandfather and the rest, inherit the estate. For *bhinnagotra sapindas* are indicated by the term *bandhu*.

4. Here, on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons.

5. On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue, inherit. In this manner must be understood the succession of the *samanagotra sapindas*,

6. If there be none such, the succession devolves on *samanodokas*, and they must be understood to reach the seven degrees beyond *sapindas*, or else as far as the limit of knowledge and name extend. Accordingly, Vrihat Manu says, 'The relation of the *sapindas* ceases with the seventh person and that of *samanodokas* extends to the fourteenth degree, or, as some affirm, it reaches as far as the memory of birth and name extends. This is signified by *gotra*.'

Their Lordships have preferred to adopt for the purposes of this judgment the translation which was before this Board in *Lallubhai's Case* (2).

It is to be observed that the rule in paragraph 3 is thus stated in the *Viramitrodaya* (Shastri Golap Chandra Sarkar's translation, p. 199).

"On failure of the paternal grandmother, the paternal grandfather and the other *sapindas* of the same *gotra* are heirs; since the *sapindas* (or persons connected through the *pinda* or body) of a different *gotra* are included under the term *bandhu* or cognates."

The earliest expounders appear sometimes to have used the term *bandhu* to signify a *sapinda* without any idea of including cognates. This is clear from a passage of the *Viramitrodaya*, (Shastri Golap Chandra Sarkar's Translation, p. 142) where, after quoting the rule as to the succession of collaterals given by Vishnu, who places the *bandhus* immediately after brothers' sons, it says as follows:—"Here the term *bandhu* (kinsman) signifies a *sapinda*, and the term *sakulya* (distant kinsman) means a *sagotra*, or one descended from a common ancestor in the male line (other than a *sapinda*); if by the term *bandhu* the cognates of the father were comprised, then there would be a conflict with the order mentioned by Jogiswara, the Contemplative Saint, i.e., Yajnavalkya. Yajnavalkya himself employs the expression indiscriminately in various places to signify connections and friends. But in Chapter II, of his *Dharma-sastram*, he distinctly introduces *bandhus* as acquiring a heritable right on failure of the *gotraja*. The passage in Rao Saheb Vishwanath Mandlik's translation at p. 220, is as follows:—

"The wife, daughters, both parents, brothers, and likewise their sons, *gotrajas* (gentiles), *bandhus* (cognates), a pupil and a fellow-student. Of these, on failure of the preceding, the next following in order is heir to the estate of one who has departed for heaven leaving no *putra* (lineal male descendants)."

Learned counsel for the respondents urges that this inclusion of *bandhus* or cognates forms a marked extension of the

right of inheritance to people who until then were not regarded as heirs, and he contends that it is hardly likely this remarkable change should have been made without any limitation, considering that the *sapinda*-relationship was subject to a limit.

To determine how far this contention is well-founded, it is necessary to examine a little more closely the doctrines of the *Mitakshara* relating to the succession of collaterals. Vijnaneswara in reality seems to have shaped the rules which govern this branch of the law of inheritance in force in the Benares School. In paragraph 3, Section 5, (Colebrooke's Translation) in describing the *gotraja-sapinda* or consanguineous relations sprung from the same stock, he emphasises the fact of their being members of the same family by the specific statement that the *sapindas* belonging to a different family (*gotra*)—the *bhinna-gotra*—are included under the designation of *bandhus*. This is clearly borne out by the passage of the *Viramitrodaya* already referred to. Henceforth the word *bandhu*, therefore, has, in the system of the *Mitakshara*, a distinctive and technical meaning, in other words it signifies the *bhinnagotra-sapindas*.

In paragraph 5 for the word *gotraja-sapinda* is substituted the more definite term of *samana-gotra sapinda*. With regard to this Messrs. West and Buhler observe that "The substitution of *samana-gotra* for *gotraja* as well as the employment of *binnagotra* to designate the opposite of the term, both show that Vijnaneswara took *gotraja* in the sense of belonging to the same family." Commenting on the passage relating to the succession of the *gotraja sapinda*, the *Viramitrodaya*, which is regarded as one of the most important commentaries on the *Mitakshara*, says "similarly to the seventh (degree) the *sapindas* of the same *gotra* take the estate of a person without male issue," see Shastri Golap Chandra Sarkar's Translation, p. 199.

This limitation of the seventh degree appears in Yajnavalkya's Institutes, Chapter I., paragraphs 52, 53, in these words:—"A man should marry a girl . . . who is not a *sapinda* of him . . . who is descended from one whose *gotra* and *pravara* are different from him and who is removed five degrees on the mother's and seven on the father's side;"

see Rao Saheb Vishwanath Mandlik's Translation, p. 167. The comment of Vijnaneswara on this text of Yajnavalkya has already been given *in extenso* in a previous part of this judgment, but the following lines may be quoted again with advantage:—"On the mother's side, in the mother's line after the fifth; on the father's side, in the father's line, after the seventh (ancestor) the *sapinda* relationship ceases;" West and Buhler, page 119; Mayne's Hindu Law (7th edition), page 691, paragraph 516.

The translation by Golap Chandra Shastri of the passage, in which these words occur, is important, as he is the authority on whose exposition the appellants chiefly rely. It runs thus:—

"While explaining the term *non-sapinda*, the *sapinda* relationship is stated to be directly or mediately through connection with one body, but that relationship of all persons may, in one way or other, be traced with all other persons in this world of eternal transmigrations of the soul with its minute body, and so it would include persons that are not intended to be included; hence it is ordained:—

'and is beyond the fifth and seventh from the mother and from the father (respectively).'

'The purport is, that *sapinda* relationship ceases beyond the fifth from the mother, *i.e.*, in the mother's line, and beyond the seventh from the father *i.e.*, in the father's line.' (Golap Chandra Sarkar's Hindu Law, p. 54.)

It is quite clear, therefore, that the limitation of the seventh degree with regard to the *samanagotra sapindas* given by Mittra Misra in the Viramitrodaya is taken from the rule enunciated by Vijnaneswara on Yajnavalkya in the Achara Kanda in respect of the cessation of *sapinda* relationship.

Now, a *bhinnagotra sapinda* is a *bandhu* according to Vijnaneswara. The classification contained in Section 6, Chapter II, (Colebrooke's Translation) shows clearly who the *bandhus* are whom Vijnaneswara treats as *bhinnagotra-sapindas* entitled to succession on failure of the *gotraja*. The passage as translated by Mr. Colebrooke runs thus:—

"1. On failure of gentiles, the cognates are heirs. Cognates are of three kinds: related to the person himself, to his father, or to his mother; as is declared by the following text, 'The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal

aunt, the sons of his mother's maternal aunt and the sons of his mother's maternal uncles, must be reckoned his mother's cognate kindred."

"2 Here, by reason of near affinity, the cognate kindred of the deceased himself, are his successors in the first instance, on failure of them, his father's cognate kindred, or if there be none his mother's cognate kindred. This must be understood to be the order of succession here intended."

Here Mr. Colebrooke renders the word *gotraja* into gentiles, and *bandhus* into cognates. He also paraphrases the three classes under which Vijnaneswara groups the technical *bandhus*, *viz.*, the *atma-bandhus*, the *pitri-bandhus* and the *matri-bandhus* as "cognates related to the person himself, to his father, or to his mother."

Their Lordships have little doubt reading these passages by the light of the comments in the Viramitrodaya, (at p. 200) that Vijnaneswara was using the term *bandhu* in a restricted and technical sense, as implying a relation belonging to a different family but united by *sapinda*-relationship. In fact he expressly says so (paragraph 3, Section 5, Chapter II.)

It is not disputed that the plaintiffs do not come within the three categories mentioned above. But it is urged on the authority of *Girdharilal Roy v. Government of Bengal* (5) that the enumeration is not exhaustive but merely illustrative.

In that case the question for decision was whether a maternal uncle not being specifically included in the enumeration of *bandhus* in the *Mitakshara* was excluded from succession. Answering that proposition in the negative, and holding that although not expressly mentioned he was entitled to succeed as a *bandhu* this Board observed that the text did not purport to be an exhaustive enumeration of all *bandhus* "who are capable of inheriting," nor was it cited as such for that purpose by the author; and that it was used simply as a proof or illustration of his proposition that there are three kinds or classes of *bandhus*. These remarks hardly warrant the contention, which is attempted to be based on them, that the classes specified by Vijnaneswara can be added to.

In the present case, however, it does not seem necessary to their Lordships to enter upon the determination of the question whether the classes can be ex-

(5) [1868] 12 M. I. A. 448=1 B. L. R. 44=2 Sar. 382=2 Suther. 159=10 W. R. 31 (P.C.).

tended, for the point at issue can be decided on other grounds.

The limitation of five degrees clearly applies, and can only apply to the *blin-nagotra sapindas*. But it is contended that this limitation is confined to prohibition in respect of marriage. As has already been observed, a part of the limitation appears to have been applied to the succession of *samanagotra sapindas*; their Lordships are unable to see on what principle can it be said that the other part relative to kinsmen, who are equally *sapindas* but belong to a different *gotra* or gens, must be restricted to matrimonial affinity.

Considerable reliance has been placed on the statement of the law by Shastri Golap Chandra Sarkar in his work on Hindu law. Great respect is due to the opinions of that learned lawyer. But it seems to their Lordships that their weight is considerably discounted by his desire, in order to prevent the deceased's property becoming so to speak derelict and thus escheating to the Crown, to bring in the caste-people of the deceased also as *bandhus*; and the somewhat uncertain note of his conclusion (at page 74) where he says:—

"The conclusion, therefore, which appears to legitimately follow from the foregoing consideration, is, that the word *bandhu* in the Mitakshara means and includes either all cognate relations, without any restriction, or at any rate, all cognates within seven degrees on both the father's as well as on the mother's side."

Again, his attempt to widen the signification of the word *sapinda* by employing the English equivalent of *relation* does not seem to be supported by the definition of *sapinda* relationship in the Mitakshara itself.

Reference has also been made to certain passages in Rao Saheb Vishwanath Mandlik's valuable work, in which he says that the *sapinda*-relationship for inheritance is not always the same as for marriage or impurity (arising from birth or death). That may or may not be; but in one part of his work to which the Judicial Commissioner has referred in his judgment, the learned translator of Yajnavalkya distinctly says that *sapinda* connection in general is "co-extensive with that for marriage purposes." Nor in this connection their Lordships think can the following passage in the Viramitrodaya be overlooked:—

"And the text, '*sapinda*-relationship, however, ceases in the seventh generation'—is to be explain-

ed consistently with the text of Yajnavalkya, namely, after the fifth and the seventh from the mother and the father (respectively) to mean that it remains in the seventh but ceases in the eighth generation. Hence, as in the case of the unmarried females, the *sapinda* relationship extending over three generations, as is declared in the chapter on impurity (occasioned by death, &c.) is considered to be with reference to that alone; so it is to be deemed that this *sapinda*-relationship (extending to the fourth degree) is relative to succession alone." (Viramitrodaya, p. 157.)

In the absence of any authoritative text their Lordships do not see their way merely on abstract reasoning to displace a view of the law which has received the recognition of the Courts in India, and which the District Judge, an officer of great experience and learning, says is accepted by "public opinion." As has already been observed, the right of inheritance is founded on *sapinda*-relationship, which, under the Mitakshara, means consanguinity, in a distinct legal sense clearly explained by the author. This bond comes to an end with the fifth degree when the descent is through a female. It seems difficult to conceive that the right to inherit should continue after the relationship on which it is founded, and which gives it birth, has come to an end.

In the case of *Umaid Bahadur v. Udai Chand* (4) one of the tests employed for determining whether the defendant in that case was a *sapinda* of the propositus was the mutuality of *sapinda* relationship. The doctrine of mutuality is based on the rule enunciated by Manu, and is fully explained by Rajkumar Sarvadhikari in his Lectures at page 690. Another well-known Hindu writer of the present day speaks thus of the above rule:—

"It is to be observed here that the wealth of a *sapinda* is taken by his nearest *sapinda*, according to the well-known text of Manu. From that text it follows that the relation of *sapindaship* must be mutual. Among agnates the relation of *sapindaship* is always mutual; but among cognates it is not so in a few cases. In order to determine whether any persons are heritable cognates of the propositus 'it is necessary to see whether they are related as *sapindas* to each other.' *Umaid Bahadur v. Udai Chand* (4). Unless *sapindaship* is mutual, one cannot be the heir of the other." (Commentary on Hindu Law by J. N. Bhattacharyya, p. 459).

In *Babu Lal v. Nanku Ram* (6) the rule of the Mitakshara enunciated in the *Acharya Kanda* relative to *sapinda*-relationship in respect of marriage is assumed as applicable to inheritance. In fact the judgment proceeds on that basis; and the order of *sapinda*-relationship with its limitations in Rajkumar Sarvadhikari's Tagore Law Lectures is adopted as representing a correct exposition of the Mitakshara law. The doctrine of mutuality is also explained in clear terms:—

"Again, a *sapinda* of the *propositus* to be capable of inheriting must satisfy a further condition, namely, that he must be so related to the *propositus*, that the *propositus* is also a *sapinda* of him either directly or through the father or the mother. The mutuality of *sapinda*-relationship between the *propositus* and his heritable *sapindas* is assumed as a necessary condition in the case of *Umaid Bahadur v. Udai Chand* (4) and the authority for this is to be found in the text of Manu, (Chapter IX, 187) cited in the Mitakshara, Chapter II., Section III, verse 3, as interpreted by Balambhatta and Visweswara Bhatta, the two leading commentators on the Mitakshara. The text according to these commentators means this, the property of a near *sapinda* shall be that of a near *sapinda*. From this it is clear that a man in order to be a heritable *sapinda* of the *propositus* must be so related to him that they are *sapindas* of each other."

These two decisions of the Calcutta High Court have been challenged on the ground that they represent Dayabhaga views rather than the doctrines of the Mitakshara. To their Lordships the objection seems hypothetical and without any basis excepting the criticisms of Golap Chandra Shastri. One of the learned Judges who decided *Babu Lal's Case* (6) was the distinguished Judge and erudite Sanskrit scholar, Mr. Justice Gurudas Banerjee, who was not likely to allow his mind to be confused by Dayabhaga conceptions in determining a case under the Mitakshara law.

The general conclusion to which a close examination of the authorities leads their Lordships may be briefly stated as follows: (a) that the *sapinda*-relationship, on which the heritable right of collaterals is founded, ceases in the case of the *bhinnagotra sapinda* with the fifth degree from the common ancestor; (b) that in order to entitle a man to succeed to the inheritance of another he must be so related to the

latter that they are *sapindas* of each other, which is only a paraphrase of Manu's rule.

In the present case, the plaintiffs are Laxmanrao's paternal grand-father's sons's sons's daughter's daughter's sons. They are his *bhinnagotra* beyond the fifth degree, and, as the District Judge points out, the element of mutuality is wanting between them and Laxmanrao.

Two considerations were strongly pressed on behalf of the appellants to induce their Lordships to extend the application of the *sapinda*-relation in the case of *bandhus* beyond the fifth degree mentioned in the Mitakshara. It was urged that it is hardly likely Vijnaneswara would give a right of inheritance to a spiritual preceptor or *guru* before kinsmen, however remotely connected. This argument appears to ignore the peculiar and intimate relationship which their Lordships understand exists in the Hindu system between the pupil and the *guru* who has to initiate him into the mysteries of the Vedic laws and rites, and under whose roof he has to pass many years of his life. It is easy to suppose that in such circumstances the mystical relationship between a spiritual preceptor and a pupil should be regarded as creating a far closer tie than remote relationship of blood.

As regards the other consideration which is based on the possibility of the Crown becoming a claimant in the presence of remote *bhinnagotra*, their Lordships need only observe that whether such a claim would be justified or even be likely to be advanced, it does not seem necessary to express an opinion in the present case. Here the defendant is in possession of Laxmanrao's estate claiming as heir to his wife, Laxmanrao's daughter. The plaintiffs' suit is an action in ejectment, and they must, in order to succeed, strictly prove their title. It is a matter of satisfaction to their Lordships that they find themselves in complete agreement with the learned Judges in the Courts below. The District Judge is himself a Hindu versed in Sanskrit, and has examined the authorities in original. His decision is entitled to great weight and consideration. Their Lordships are of opinion that this appeal should be dismissed, and they will humbly advise His

(6) [1894] 22 Cal. 339.

Majesty accordingly. The appellants must pay the costs of this appeal.

T. R. R. *Appeal dismissed.*

Solicitor for Appellant—E. Dalgado.

Solicitors for Respondents—T. L. Wilson & Co.

*** * A. I. R. 1914 Privy Council.**
(FROM NAGPUR).

22nd October, 1914.

LORDS DUNEDIN AND SHAW, SIR JOHN
EDGE AND MR. AMEER ALI.

Seth Ram Lal and another—Defendants-
Appellants

v.

Narsingdas and others—Plaintiffs-Res-
pondents.

** * Compromise—Mortgage by one partner of whole of partnership property—Compromise releasing half to the other partner on payment of a certain amount towards debt—Mortgage found not binding by the Board on the other partners—The mortgage debt having been realised in full from the mortgaging partner, he sued the other for contribution as per terms of compromise—Liability enforceable despite the Board's decision that the other's share was not liable under the mortgage—Contribution.*

B, one of two partners purported to mortgage the whole of the partnership property to N. In a partnership suit brought by the other partner, L, following on a dissolution of partnership, a compromise decree was passed whereby L was to pay Rs. 8,200 to the mortgagee N, and his portion of the property was to be freed from the mortgage. This amount was never paid to N, the mortgagee brought a suit on the mortgage and on appeal the Board held, the mortgage bound only B's share and not the whole of the partnership property. B's property was sold and N's debt satisfied. B now sued L for contribution. It was contended that the compromise contemplated a payment conditional on B, freeing the other part of the property which was in fact done by the Judgment of the Privy Council.

Held: The compromise however foolish, was of a disputed point necessarily admitting that the mortgage was for a partnership debt, and from the moment the agreement was entered into, Rs. 8,200 became a debt due by L to N for the purpose of adjustment between the ex-partners of the dissolved partnership, namely B and L and as L, who could have paid the money direct to N, did not do so, B paid it and to make good the terms of the compromise L must now pay it to B. [P. 11, C. 1.]

DeGruyther and J. M. Parikh—for Appellants.

E. Richards and Lowndes—for Respondents.

Lord Dunedin :—The claim in the present suit arises out of the following circumstances :—

Two parties were interested in property which they held in partnership, and one of them, called Lakmichand, brought a partition suit against his partner Bhajanlal, following on a dissolution of the partnership in which the Court gave effect to a compromise which the two parties themselves had effected. The judgment which was pronounced by the Court in that case is to be found at page 29 of the Record. There had been a mortgage granted by Bhajanlal in favour of a person called Narsingdas, and that mortgage purported to convey, as security for the debt which was thereby constituted, the whole of the partnership property.

It was a moot point, however, between the partners as to whether the partner who executed that mortgage had in truth any right to subject the whole of the partnership property to the debt, or whether he was not in fact only able to burden his own share. This being so, one of the terms of the arrangement which was made binding between the parties in the judgment pronounced was that the plaintiff, who is now represented by the present defendants and appellants, should pay to Narsingdas, that is, in other words, to the mortgagee, Rs. 8,200 and that the defendant Bhajanlal, who is now represented by the present plaintiffs and respondents, should free the other parties' portion of the property from the mortgage.

It is admitted that the defendants, that is to say, the present appellants, never did pay the Rs. 8,200 except to the small extent of Rs. 200, to Narsingdas. Narsingdas thereafter brought a suit to make good his mortgage, and in the course of that suit it was found eventually by the highest Court, by this Board, that truly the mortgage only bound Bhajanlal's share and not the whole partnership property.

Payment to the mortgagee Narsingdas was effected by the sale under that suit of Bhajanlal's property, and the result of course, was that he had to pay the whole of Narsingdas' debt. Inasmuch as the present appellants had never paid the Rs. 8,200 to Narsingdas, it is quite evident that Bhajanlal had to pay Rs. 8,000 more to Narsingdas than he should have paid. Accordingly the present respondents sue for contribution,

The defence really comes to this, that the payment which is stipulated for in the judgment which was the result of the compromise is a payment which is conditional upon the other party doing his share. It is said that Bhajanlal never did free the other part of the property from the mortgage because that was freed not by anything done by him, but by the judgment of the Privy Council in the suit which has already been mentioned.

Their Lordships are of opinion that the case is quite correctly put by the learned Judicial Commissioner from whose judgment the present appeal lies. Speaking of the mortgage-debt due to Narasingdas, he says :

"It was a disputed point as to whether Bhajanlal should pay all or only half of it, and that dispute was compromised by an agreement which necessarily admitted that it was a partnership debt whereof the defendants (in this suit) on that date were liable to pay Rs. 8,200. From that moment the Rs. 8,200 became a debt due by the defendants to Narasingdas for the purpose of adjustment between the ex-partners of the dissolved partnership."

Their Lordships think that that is the true key to the case and that it is out of the question now for the present appellants to try to get out of the compromise by saying that if the Privy Council case had been then decided they would have found themselves free of the liability without entering into the undertaking to pay Rs. 8,200. They are bound by that compromise, however foolish it may have been. They might have paid the money direct to Narasingdas; they did not pay it, and the respondents had in consequence to pay it to him. Accordingly, to make good the terms of the compromise, the appellants must now pay it to the respondents.

Their Lordships will accordingly humbly advise His Majesty to dismiss the appeal with costs.

T. A.

Appeal dismissed.

Solicitor for Appellants :— E. Dalgado.

Solicitors for Respondents :— Downer and Johnson.

A.I.R. 1914 Privy Council.

(FROM ALLAHABAD.)

25th November 1914.

LORDS DUNEDIN AND SHAW, SIR JOHN EDGE AND MR. AMEER ALI.

Kumar Digambar Singh—Plaintiff.
Appellant

v.

Ahmad Sayeed Khan—Defendant-Respondent.

Privy Council Appeal No. 102 of 1913.

(a) *Pre-emption—Wajib-ul-arz—Construction—Pre-emption by co-sharers and proprietors applicable to transfers by mortgagee—Mortgagee as such was held not entitled to pre-emption by being treated as co-sharer.*

The relevant passages in certain *wajib-ul-arz* stated that every co-sharer, mortgagor or mortgagee shall as such be at liberty to make transfers. But he was to first transfer to his own *ekjaddi* brothers, and then to co-sharers in the *khata* and *patti* as well as in favour of proprietors of the village, and only as a last resort, in favour of strangers. Pre-emption was expressly allowed.

Held, that the references to mortgagors and mortgagee in the passages referred to were obscure, but that it was not meant to treat mortgagees as such, as sharers in the *mouza* and to confer on them a right to pre-empt. [P. 14, C. 1.]

(b) *Pre-emption—Wajib-ul-arz—Question depending upon interpretation of certain vernacular words used therein—Records of the case sent to P.C. must show the vernacular words.*

In a suit for pre-emption certain *wajib-ul-arz* of 1863 and 1870 were relied upon.

Held that having regard to some of the decisions of the High Court of Allahabad which had been referred to in the argument it was unfortunate that the record which was before the Board did not show what was the vernacular word in the *wajib-ul-arz* of 1863 and 1870 which had been translated as "co-sharer" or what was the vernacular word in the *wajib-ul-arz* of 1863 which had been translated as "village." [P. 14, C. 1.]

(c) *Wajib-ul-arz—Construction—Partition clause—Sharers in other mahals were held not to have any proprietary interest in the separated mahal.*

The partition clause in a *wajib-ul-arz* provided for partition being made of the shares of the co-sharers.

Held construing the clause [*vide* the judgment for the terms of the clause] that it might be reasonably inferred from the clause that the sharers not only contemplated that the *mauza* might be subsequently partitioned into separate mahals but also intended that on a partition off from the *mauza* of a separate mahal, the sharers in the other mahals or in the unpartitioned portion of the *mauza* should as such have no share or other proprietary interest in the separated mahal. [P. 14, C. 1.]

(d) *Pre-emption—Village communities in Br. India—Origin and development of the law*

of pre-emption discussed—When right of pre-emption depends on contract or custom, the same if disputed, must be proved.

Pre-emption in village communities in British India had its origin in the Muhammadan Law as to pre-emption, and was apparently unknown in India before the time of the Moghul rulers. In the course of time customs of pre-emption grew up or were adopted among village communities. In some cases the sharers in a village adopted or followed the rules of the Muhammadan law of pre-emption and in such cases the custom of the village follows the rules of the Muhammadan law of pre-emption. In other cases, where a custom of pre-emption exists, each village community has a custom of pre-emption which varies from the Muhammadan law of pre-emption and is peculiar to the village in its provisions and in its incidents. A custom of pre-emption was in all cases the result of agreement amongst the share-holders of the particular village and may have been adopted in modern times, and in villages which were first constituted in modern times, rights of pre-emption have in some provinces been given by Acts of the Indian Legislature. Rights of pre-emption have also been created by contract between the sharers in a village. But in all cases, the object is, as far as possible, to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption when they exist, are valuable rights and when they depend upon a custom or upon a contract the custom or the contract as the case may be, must, if disputed, be proved. [P. 14, C. 2.]

* (e) *Pre-emption—Custom of pre-emption existing when Mouza was not partitioned—Claim to pre-empt after the Mouza was perfectly partitioned—The onus of proof is on the claimant, that the custom operates even after partition.*

The appellant sought to pre-empt a property in Mahal Bhawani Das which was one of the five mahals into which *Mouza Pala Kher* was divided, as a sharer in one of the other four Mahals. Before such partition there was a custom of pre-emption obtaining in the *Mouza Pala Kher*, which the appellant proved.

Held, that this was not sufficient to entitle the appellant for a decree. It would be necessary for him to show either on the construction of the *wajib-ul-arzes* (by which he proved the existence of the custom before partition) or by other evidence that the custom of pre-emption which obtained in the unpartitioned *Mouza Pala Kher* would survive a partition of that *Mouza* into separate Mahals so as to give a sharer in one of the new Mahals a right to pre-empt property in another of those Mahals in which he was not a sharer at the date of sale. [P. 15, C. 1.]

In 1863, *Mouza Pala Kher* was unpartitioned and all its share-holders were Mahomedans. The *Wajib-ul-arz* papers of that year, admitted the existence of a custom of pre-emption. It also recognised the right of the sharers to a partition. When partition of the *Mouza* was applied for in 1905, Hindus also had become sharers and nothing was done on partition to provide that sharers in one Mahal should have a right of pre-emption in respect of a sale in another mahal in which they were not sharers. In these circumstances the inference could not be drawn that it was intended that after partition the sharer in one Mahal should

have a right of pre-emption in another Mahal. The question if a custom of pre-emption existing before partition survives such partition is a question depending on the circumstances of each case and inferences which may legitimately be drawn from the evidence. 22 All. 1 Ref. The view of Banerjee, J., in 22 All. 1, that the absence of fresh *wajib-ul-arz* at partition does not necessarily involve the consequence that the pre-existing contract or custom of preemption is to have no effect, not dissented from. [P. 15, Cols. 1 & 2.]

(f) *Pre-emption—Wajib-ul-arzes—They are evidence of custom of pre-emption and need not be corroborated by evidence of instances in which such custom has been enforced—Such evidence is rebuttable.*

The *Wajib-ul-arzes* having been prepared in accordance with law, and the sharers having signed them they are enough evidence regarding the custom of pre-emption and need not be corroborated by evidence of instances, in which such custom has been enforced. To insist on such corroboration would be to increase the cost of litigation in pre-emption cases and in many cases, might practically deprive a sharer of his right. Of course the evidence as to custom of pre-emption afforded by a *Wajib ul-arz* may be rebutted by other evidence. Statements in a *wajib-ul-arz* as to rights of pre-emption which are not in contravention of Muhammad, Hindu or other law, should be considered as reliable evidence of a custom of pre-emption. [P. 16, C. 1.]

G. R. Lowndes—for Appellant.

DeGruyther and B. Dube—for Respondent.

Sir John Edge:—The suit in which this appeal has arisen was brought on the 6th August, 1910, in the Court of the Subordinate Judge of Aligarh by Kunwar Digamber Singh, who is the appellant here, against Kunwar Ahmed Sayeed Khan, who is the respondent to this appeal, and one Bhawani Das, to enforce a right of pre-emption to which Kunwar Digamber Singh claimed to be entitled under a custom which he alleged to be prevailing in *mouza Pala Kher* in the District of Bulandshahr.

The respondent here, Kunwar Ahmad Sayeed Khan, who was the vendee of the property in dispute by his written statement denied that there was any custom of pre-emption in *mouza Pala Kher* and alleged that:—

"*Mouza Pala Kher* was divided by perfect partition and entirely separate *mahals* were formed.....After the said partition no connection of any kind was left among the co-sharers of the different mahals, nor did any joint right, based on the terms of any *wajib-ul-arz*, subsist among them."

The date of the sale in respect of which pre-emption is claimed was the 12th July, 1909. In 1905, *mouza Pala Kher*,

otherwise known as *mouza* Pala Kaser, and as *mouza* Bilaksir, was, on the applications of certain of the then sharers in the *mouza* partitioned into five *mahals*, of which two were named respectively Saligram and Bhawani Das. On the partition, each of the five newly formed *mahals* became separately responsible for the revenue assessed upon it, but did not become responsible for the revenue assessed upon any other of the five *mahals*. No separate record-of-rights was before this suit framed for any of the five new *mahals*.

The property sought to be pre-empted is in *mahal* Bhawani Das, in which *mahal* the applicant had not a share at the date of the sale; he was, however, at the date a sharer in *mahal* Salig Ram, in which *mahal* neither the respondent nor his vendor, Bhawani Das, was a sharer. The respondent was not at the date of the sale a sharer in any of the five new *mahals*; he was, however, the mortgagee in possession of part of the share of Bhawani Das, the vendor, in *mahal* Bhawani Das.

The appellant and Bhawani Das are not related to each other. The respondent, who is a Muhammadan, is not related to the appellant or to Bhawani Das. Prior to the partition of 1905 *mouza* Pala Kher was an unpartitioned *mouza* in which the appellant and Bhawani Das were sharers. Of the history of *mouza* Pala Kher prior to 1863 their Lordships are unaware, but in 1863 all the sharers in the *mouza* were apparently Muhammadans.

The evidence to prove the custom of pre-emption upon which the appellant's claim is based consisted of extracts from a *wajib-ul-arz* of the *mouza* of the Pala Kher of 1863, upon extracts from a *wajib-ul-arz* of the same *mouza* of 1870, and of a judgment of the Subordinate Judge of Meerut in 1875 in a suit for pre-emption which was confirmed by the High Court at Allahabad in 1876. The cause of action in that case arose of course long anterior to the partition of *mouza* Pala Kher, but the judgments do afford evidence that there existed in *mouza* Pala Kher a custom of pre-emption under which a relation of a vendor-sharer in the *mouza* was entitled to pre-empt on a sale to a stranger to the *mouza*, but that is not the custom upon which the appellant must rely in this suit.

The extract from the *wajib-ul-arz* of *mouza* Pala Kher, which was prepared on the 16th June, 1863, as translated and so far as it is material, is as follows:—

"In future every co-sharer, mortgagor or mortgagee shall as such be at liberty to make transfers. But he shall make transfers first in favour of his own and *ekjaddi* brothers and after them in favour of co-sharers in the *khata* and *patti* as well as in favour of the proprietors of the village. If none of them take he shall be competent to make transfers in favour of strangers. If there is a dispute regarding difference in consideration it shall be decided by arbitration."

The *wajib-ul-arz* of 1863 was signed by all the sharers and by some, if not all of the mortgagees.

The corresponding clause in the *wajib-ul-arz* of 1870 as translated in the record, is as follows:—

"In future co-sharer, mortgagor or mortgagee has as such power. He shall have power to make transfers first to his own and *ekjaddi* brothers and next to co-sharers in the *khata* and *patti* as well as to proprietors. If none of the aforesaid persons takes he shall have power to transfer it to a stranger. If there arises any dispute as regards the price being more or less it shall be decided by arbitration."

In paragraph 14 of the *wajib-ul-arz* of 1870 it expressly stated "Custom as to Pre-emption is allowed." There can be no possible doubt that the clauses to which their Lordships have referred set out what the sharers in *mouza* Pala Kher had in 1863 and in 1870 agreed to be the custom of pre-emption in the *mouza*. It is to be presumed, as the contrary has not been shown, that the *wajib-ul-arz* of 1863 and the *wajib-ul-arz* of 1870 had been properly prepared, in accordance with the law then in force, and with the "Directions of Revenue Officers in North-West Provinces of the Bengal Presidency," which had been promulgated under the authority of the Lieutenant-Governor of those Provinces.

The references in the clauses above mentioned to mortgagors and mortgagees are obscure. The sharers in *mouza* Pala Kher may have intended that if a mortgagor should assign his interest as a mortgagor he should offer it in the first instance to his own or his *ekjaddi* brother and then to a sharer in the *khata* and *patti* or to a proprietor in the *mouza*, and if they should refuse to purchase it he might assign it to a stranger, and in the same if a mortgagee should wish to assign his mortgagee's interest his right to assign it should be similarly limited. In their

Lordships' opinion it was not meant by the clauses to which they have referred to treat mortgagees as such, as sharers in the *mouza* and to confer on them a right to pre-empt.

Having regard to some of the decisions of the High Court of Allahabad, which have been referred to in the arguments in this appeal, it is unfortunate that the record which is before this Board does not show what was the vernacular word in the *wajib-ul-arz* of 1863 and 1870, which has been translated as "co sharer," or what was the vernacular word in the *wajib-ul-arz* of 1863 which has been translated as "village."

The *wajib-ul-arz* of 1863 contained a clause as to partition which, as translated in the record, was as follows:—

"7. Partition, separate and compact.

"Every one can get his property partitioned to the extent of share. And if the area be compact he can also get a separate *mahal* formed. If at the time of partition the grove of one person comes to be included in the lot of another, the planter of the grove shall remain in possession as before, but the planter shall (have to) be given land of the same quality in exchange. As to a well, the costs of construction shall be given to the person who constructed it. If the *khudhasht* land of one person comes into the possession of another, then he (the person in possession) shall relinquish it of his own accord or shall pay rent as a tenant."

It appears to their Lordships that it may reasonably be inferred from this clause that the sharers of 1863 in *mouza* Pala Kher not only contemplated that the *mouza* might subsequently be partitioned into separate *mahals*, but also intended that on a partition off from the *mouza* of a separate *mahal*, the sharers in the other *mahals* or in the unpartitioned portion of *mouza* Pala Kher should as such have no share or other proprietary interest in the separated *mahal*. It does not appear from the extracts from the *wajib-ul-arz* of 1870 which are printed in the record whether the *wajib-ul-arz* of 1870 contained a similar clause, but it probably did.

It appears from the *rubkar* of the 5th December, 1902, which was drawn up for the carrying out by the *Amin* of the partition of *mouza* Pala Kher that the partition should be a perfect partition; that a grove should be allotted to the *mahal* of the person who had planted it and that a Muhammadan tomb, which stood in the *abadi*, should be allotted to the share of the Muhammadans.

The Subordinate Judge of Aligarh found that a custom of pre-emption prevails in *mouza* Pala Kher; that the partition of the *mouza* and the separation of the plaintiff's *Mahal* Salig Ram from that of the vendor did not affect the custom of pre-emption; and that the plaintiff, the appellant here, had a right to pre-empt as against the vendee, the respondent here; and on the 28th March, 1911, he gave the appellant a decree for the pre-emption. From that decree Kunwar Ahmad Sayeed Khan, the respondent here, appealed to the High Court of Judicature at Allahabad.

The Chief Justice and Mr. Justice Tudball, before whom the appeal came for hearing, allowed the appeal and dismissed the suit. From the decree of the High Court this appeal has been brought.

Pre-emption in village communities in British India had its origin in the Muhammadan law as to pre-emption, and was apparently unknown in India before the time of the Moghul rulers. In the course of time customs of pre-emption grew up or were adopted among village communities. In some cases the sharers in a village adopted or followed the rules of the Muhammadan law of pre-emption, and in such cases the custom of the village follows the rules of the Muhammadan law of pre-emption. In other cases, where a custom of pre-emption exists, each village community has a custom of pre-emption which varies from the Muhammadan law of pre-emption and is peculiar to the village in its provisions and its incidents. A custom of pre-emption was doubtless in all cases the result of agreement amongst the share holders of the particular village, and may have been adopted in modern times, and in villages which were first constituted in modern times. Rights of pre-emption have in some provinces been given by Acts of the Indian Legislature. Rights of pre-emption have also been created by contract between the sharers in a village. But in all cases the object is, as far as possible, to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption, when they exist, are valuable rights, and when they depend upon a custom or upon a contract, the custom or the contract, as the case may be, must, if disputed, be proved.

The only evidence in this case to prove that the custom, which is relied upon by the appellant existed in *mouza* Pala Kher, is afforded by the clauses relating to pre-emption which are contained in the *wajib-ul-arz* of 1863 and 1870. These clauses do, in the opinion of their Lordships, prove that prior to the partition of *mouza* Pala Kher the custom of pre-emption, which is set out in the second paragraph of Clause 2 of the plaint existed and was in force in *mouza* Pala Kher, but that would not be sufficient to entitle the appellant to a decree. It would be necessary for him to show, either on the construction of the *wajib-ul-arz* or by other evidence, that the custom of pre-emption which obtained in the unpartitioned *mouza* Pala Kher would survive a partition of that *mouza* into separate *mahals* so as to give a sharer in one of the new *mahals* a right to pre-empt property in another of those *mahals* in which he was not a sharer at the date of the sale.

This question was very carefully considered by a Full Bench of the Allahabad High Court in *Dalganjan Singh v. Kalka Singh* (1) in which Sir Arthur Strachey, J. and Mr. Justice Banerji, considered that the question in each case is that of the construction of the nature of the particular custom on which the claim for pre-emption is based, and whether the custom can apply to the altered state of things which comes into existence when a perfect partition has been effected. In that case, as in this, no new *wajib ul-arz* was framed on the partition. Their Lordships are not prepared to dissent from the view of Mr. Justice Banerji in the case which has been referred to that

"Where a fresh *wajib ul-arz* has not been prepared at partition, it does not follow, as a matter of law or principle, that the custom or contract in force before partition is no longer to have effect or operation."

The question must depend upon the circumstances of each case and the inferences which may legitimately be drawn from the evidence. In the present case their Lordships cannot overlook the fact that in 1863 all the sharers in *mouza* Pala Kher were Muhammadans; that Hindus were obtaining interests in the *mouza* as mortgagees; and that the sharers in 1863 were contemplating that the *mouza* might be partitioned. The right to obtain perfect partition, of course, existed. Nor can

(1) [1899] 22 All. 1=1899 A. W. N. 111 (F.B.).

their Lordships overlook the fact that in 1905, when perfect partition was applied for, Hindus had become sharers in *mouza* Pala Kher, and that nothing was done on partition to provide that sharers in one *mahal* should have a right of pre-emption in respect of a sale in another *mahal* in which they were not sharers. Their Lordships are unable to draw the inference from the *wajib ul-arz* and the circumstances in this case that it was intended that, in case of perfect partition of *mouza* Pala Kher, a sharer in one *mahal* should have a right of pre-emption in another *mahal* in which he was not a sharer.

The learned Judges who decided the appeal in this case in the High Court apparently considered that the evidence afforded by the *wajib-ul-arzes* of 1863 and 1870 did not prove any custom of pre-emption, and each of them also relied upon the fact that no evidence that the right of pre-emption has been exercised was given. The learned Chief Justice also apparently suggested doubts as to the value of a *wajib-ul-arz* as evidence of custom of pre-emption when unsupported by evidence that the custom had been enforced. As their Lordships have already intimated, they have no doubt that the clauses relating to transfers of shares in the *wajib-ul-arzes* of 1863 and 1870 stated what the sharers in 1863 and the sharers in 1870 had agreed was the custom of pre-emption in *mouza* Pala Kher. These clauses were inartistically drafted. The *Kanungo* or other official who collected information from the sharers in the *mouza* may have been a person who was as ignorant as they were of legal forms and legal phraseology, but before the *wajib-ul-arz* were signed by the sharers or sanctioned by the settlement officer, the sharers had an opportunity of objecting to any statements contained in them which they did not understand or did not consider to be correct. Pre-emption was a matter in which all the sharers were interested; it was a matter as to which they could agree as to what the custom in their *mouza* was. Pre-emption, with various incidents, limitations, and restrictions, prevails by custom or by special agreement amongst share-holders in very many, if not in most or all, of the village communities in the province in which *mouza* Pala Kher is situate,

In agreeing as to the custom of pre-emption which should be inserted in the *wajib-ul-arz* the sharers were not trying to establish any rule of inheritance in the *mouza* inconsistent with the Muhammadan or the Hindu Law of Inheritance, and their Lordships fail to see on what principle statements in a *wajib-ul-arz* as to rights of pre-emption, which are not in contravention of Muhammadan, Hindu or other law, should not be considered as reliable evidence of a custom of pre-emption. To hold that a *wajib-ul-arz* is not by itself good *prima facie* evidence of a custom of pre-emption which is stated in it and that the *wajib-ul-arz* requires to be corroborated by evidence of instances in which the custom has been enforced would be to increase the costs of litigation in pre-emption cases, and in many cases might practically deprive a sharer of his right. Of course the evidence as to a custom of pre-emption afforded by a *wajib-ul-arz* may be rebutted by other evidence.

The appellant has failed to prove that he is entitled to a decree. Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

S. A. R. *Appeal dismissed.*

Solicitors for Appellant—T. L. Wilson and Co.

Solicitor for Respondent—Douglas Grant.

****A. I. R. 1914 Privy Council.** (FROM ALLAHABAD)

25th November, 1914.

LORDS DUNEDIN AND SHAW, SIR JOHN
EDGE AND MR. AMEER ALI.

Jambu Prasad—Plaintiff-Appellant

v.

Muhammad Nawab Aftab Ali Khan and others—Defendants-Respondents.

Privy Council Appeals Nos. 131 and 132 of 1913.

Registration Act (III of 1877), Ss. 32 & 33—Presentation for registration by an agent not duly authorised according to Ss. 32 & 33—Registration is invalid—Executant admitting execution does not make the registration valid.

The terms of Sections 32 and 33 of Act III of 1877 are imperative and a presentation of a document for registration by an agent who has not been duly authorised in accordance with these sections does not give the registering officer the indispensable foundation of his authority to regis-

ter the document, which comes into force if and when only a document is presented to him in accordance with law. The executants who appear and admit execution cannot be treated for the purpose of Section 32 as presenting the deed for registration. One object of Sections 32, 33, 34 and 35 was to make it difficult for persons to commit fraud by means of registration under the Act. It is the duty of the Courts not to allow the imperative provisions of the Act to be defeated when it is proved that an agent who presented a document for registration had not been duly authorised in the manner prescribed by the Act 23 All. 233 applied 28 Ali. 707 approved.

DeGruyther and O'Gorman—for Appellant.

G. R. Lowndes—for Respondents.

Sir John Edge:—These are consolidated appeals from two decrees, dated the 13th February, 1912, of the High Court of Judicature at Allahabad, one of which affirmed the decree of the Subordinate Judge of Saharanpur of the 26th of September, 1910, and the other of which partly affirmed and partly reversed a decree of the same Subordinate Judge of the 26th September, 1910. The suits in which the decrees were made were brought in the Court of the Subordinate Judge of Saharanpur, one on the 20th May, 1909, and the other on the 16th of March, 1910. They were suits for sale of immoveable property. The suit of 1909 was based on a mortgage-deed of the 10th of August, 1886, the consideration for the mortgage having been Rs. 7,000. The suit of 1910 was based on a mortgage-deed of the 2nd of July, 1882, the consideration for that mortgage-deed having been Rs. 59,000, and upon a mortgage-deed of the 25th of October, 1892. There was in suit a claim for a money-decree. The Subordinate Judge dismissed the suits on the grounds that the mortgage-deeds had not been validly registered, and consequently could not affect the immoveable property which was comprised in the mortgages, and that claims for money-decrees were time-barred. On appeal to the High Court at Allahabad, the High Court dismissed the appeal in the suit of 1909, which was based on the mortgage of 1886, dismissed the appeal in the suit of 1910 so far as it related to the mortgage of 1882, and allowed the appeal in that suit so far as it related to the mortgage of 1892. These consolidated appeals are from the decrees of dismissal. The plaintiff in the suits is the appellant here. The respondents have been defend-

ants in these suits, and one of them is the representative of a deceased defendant.

The only questions which have to be considered in these consolidated appeals are, whether the mortgage-deed, dated the 2nd July, 1882, and the mortgage-deed, dated the 10th August, 1886, were validly registered under Act III of 1877. They were documents which were required by Section 17 of Act III of 1877 to be registered. If they were not validly registered, they could not, by reason of Section 49 of that Act, affect any immoveable property comprised in them, or be received as evidence of any transaction affecting such property. Further, if the documents of 1882 and 1886 were not validly registered instruments, no mortgage could by reason of the first paragraph of Section 59 of Act IV of 1882, be effected by them. They were in fact registered, but the question is—was the registration a valid registration? The Subordinate Judge and the High Court found that there was no valid registration in either case.

In Section 32 of Act III of 1877 it is enacted that:—

"Except in the cases mentioned in Section 31, every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office, by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order or by the representative or assign of such person, or by the agent of such person, representative or assign, duly authorised by power of attorney executed and authorised in manner hereinafter mentioned."

So far as is material to the decision of these appeals, it is in Section 33 of Act III of 1877 enacted:—

"For the purpose of Section 32 the powers of attorney next hereinafter mentioned shall alone be recognized (that is to say):—

"(a) If the principal at the time of executing the power of attorney resides in any part of British India in which this Act is for the time being in force, a power of attorney executed before and authenticated by the registrar or the sub-registrar within whose district or sub-district the principal resides."

The mortgage-deed of the 2nd July, 1882, was presented for registration on the 11th of July, 1882, at Saharanpur, at the proper registration office on behalf of Lala Mitter Sen, the mortgagee, by one Nathu Mal, who held the power of attorney, of the 19th June, 1882, from Lala Mitter Sen, which however, did not empower Nathu Mal to present documents for registration. Lala Mitter Sen lived at

Saharanpur and the power of attorney had been duly authenticated by the then Sub-Registrar of Saharanpur on the 19th June, 1882, but apparently it had not been executed before the Registrar or the Sub-Registrar. The Sub-Registrar's note to the copy of the power of attorney in the Register merely states that Lala Mitter Sen was known to him, and admitted the execution and completion of the document. It has not been proved that Nathu Mal held any other power of attorney from Lala Mitter Sen. The mortgagors admitted before the Sub-Registrar of Saharanpur, on the 11th July, 1882, the execution and completion of the mortgage-deed, and received in his presence the mortgage-money, Rs. 59,000, and thereupon the Sub-Registrar registered the mortgage-deed.

The mortgage-deed of the 10th August, 1886, was presented for registration on the 9th September, 1886, at Saharanpur, at the proper registration office, on behalf of Lala Mitter Sen, the mortgagee, by one Ilahi Bakhsh, who held a power of attorney of the 17th February, 1885, from Lala Mitter Sen, which however, did not empower Ilahi Bakhsh to present documents for registration. This power of attorney had not been authenticated by the Registrar or the Sub-Registrar of Saharanpur, and it does not appear that it had been executed by Lala Mitter Sen, before either of those officials. It has not been proved that Ilahi Bakhsh held any other power of attorney from Lala Mitter Sen. The mortgagors admitted before the Sub-Registrar of Saharanpur on the 9th September, 1886, the execution and completion of the mortgage-deed of the 10th August, 1886, and acknowledged the receipt by them of the mortgage-money, Rs. 7,000, and thereupon the Sub-Registrar registered the mortgage-deed.

It was contended on behalf of the appellant here that it might be presumed the mortgage deeds had been presented for registration by the mortgagors who had executed the deeds, and who attended before the Sub-Registrar. It is, however, obvious that the mortgagors had attended at the office of the Sub-Registrar to admit that they had executed the deeds and not to present them for registration, and that they did not present them for registration. The mortgagors attended to enable the Sub-Registrar to comply

with Sections 34 and 35 of Act III of 1877 by satisfying himself that they had executed the deeds. In the one case the deed was presented for registration by Nathu Mal, an agent of the mortgagee, and in the other case the deed was presented for registration by Ilahi Bakhsh, another agent of the mortgagee, and in neither case did the agent hold such a power of attorney as was necessary to enable a valid registration to be made.

It was decided, and as their Lordships considered correctly, by Sir John Stanley, C. J. and Sir George Knox, J., in 1906, in *Ishri Prasad v. Baijnath* (1), that the terms of Sections 32 and 33 of Act III of 1877 are imperative, and that a presentation of a document for registration by an agent, in that case the agent of a vendee of immoveable property, who has not been duly authorized in accordance with those sections, does not give to the Registering Officer the indispensable foundation of his authority to register the document. As those learned Judges said:—

"His (the Sub-Registrar's, jurisdiction only comes into force if and when a document is presented to him in accordance with law."

These learned Judges also rightly decided in the same case that the fact that the Sub-Registrar had summoned before him the executant of the deed, who was the vendor, and had obtained his consent to the registration of the deed, did not give the Sub-Registrar Jurisdiction to register it and that the omission of the Registering Officer to notice that the power of attorney under which the agent had presented the sale-deed for registration had not been executed or authenticated in accordance with Section 33 of Act III of 1877 could not be regarded as a defect in procedure within the meaning of Section 87 of that Act.

Although the facts in these consolidated appeals are not the same as were the facts in *Mujib-un-nissa v. Abdur Rahim* (2), their Lordships consider that the principle which this Board applied in that case is applicable here. That principle, in their Lordships' opinion, is that a

Registrar or Sub-Registrar under Act III of 1877 has no jurisdiction to register a document unless he is moved to do so by a person who has executed or claims under it, or by the representative or assign, duly authorized by a power of attorney executed and authenticated in manner prescribed in Section 33 of that Act. It is obvious that executants of a deed who attend before a Registrar or Sub-Registrar merely to admit that they have executed it cannot be treated, for the purpose of Section 32 of Act III of 1877, as presenting the deed for registration. They, no doubt, would be assenting to the registration, but that would not be sufficient to give the Registrar jurisdiction.

One object of Sections 32, 33, 34 and 35 of Act III of 1877 was to make it difficult for persons to commit frauds by means of registration under the Act.

It is the duty of the Courts in India not to allow the imperative Provisions of the Act to be defeated when, as in this case, it is proved that an agent who presented a document for registration had not been duly authorized in the manner prescribed by the Act to present it.

These appeals fail and their Lordships will humbly advise His Majesty that the appeals should be dismissed. The appellant must pay the costs of these appeals.

T. S. N. *Appeals dismissed.*

Solicitors for Appellant—Ranken Ford, Ford and Chester.

Solicitors for Respondents—T. L. Wilson & Co.

A. I. R. 1914 Privy Council. (FROM BOMBAY)

26th November, 1914.

LORDS DUNEDIN AND SHAW, SIR JOHN
EDGE AND MR. AMEER ALI.

Jehangir Dadabhoy and another—Defendants-Appellants

v.

Kaikhusrus Kavasha and others—Plaintiffs-Respondents.

Privy Council Appeal No. 78 of 1913.

* * Will—Construction—One clause giving away half the property absolutely to one son; another clause directing the same half to be given to such son's son if one be born on his attaining his full age—Under the terms of the

(1) (1906) 28 All. 707=3 A.L.J. 743=1906 A.W.N. 195.

(2) (1900) 23 All. 233=28 I.A. 15=5 C. W. N. 177=11 M. L. J. 58=3 Bom. L. R. 154 (P.C.).

will half the estate conveyed to the testator's son vested in him a morte testatoris—Succession Act, S. 111.

Under a will left by a Parsi, the estate was effectually and equally divided between his two sons. Then followed a clause:—"At present my elder son P. has no male issue. He has only a daughter. Therefore if my elder son P. gets a male issue, half of the 'estate' is to be made over to him on his attaining his full age."

Held, that under the terms of the will half the estate conveyed vested in P. a *morte testatoris*. The destination over to a son who should take upon attaining 21 years of age was language appropriate to the events of the death of P. during the life-time of the testator and of his having left a son—the situation also being provided for of that son being at that period of time under twenty-one.

But when the father P. himself survived the testator, P's. right was not cut down to a tenancy for life therein or to an estate defeasible on his son attaining majority. [P. 20. C. 1 & 2.]

The result arrived at by the above construction is also reached by the application of Section 111 of the Indian Succession Act. [P. 20. C. 2.]

DeGruyther and Horane Miller—for Appellants.

Robert Finlay and G. R. Lowndes—for Respondents.

Lord Shaw :—This is an appeal from a decree of the High Court of Judicature at Bombay, dated the 9th December, 1910. The High Court affirmed a decree of the Subordinate Judge of Thana, dated the 2nd April, 1910.

The case has reference to the construction of a will executed by one Dadabhoy Byramji on 8th August, 1866. By this will the testator narrated that of his three sons then living he has given one in adoption to a paternal uncle. His other two sons were named Pallonji and Jehangirji. The material portions of the will disposing of the "estate" are these:—

"The said two sons are proprietors, half and half alike, and in equal (shares), of my whole 'estate', outstandings, debts, title and interest..... Both the heirs are to take care of the said 'estate' and look after it, and both the heirs living together, are duly to enjoy the balance which may remain after payment of the Sarkar's assessment.... In this my testamentary writing I, the testator, have appointed my two sons as (my) heirs."

The will then states that Pallonji, the elder, a man then of about thirty-nine years of age, was in a confused state of mind, and that the other son Jehangirji was accordingly entrusted with the management of the "estate."

"By his true and pure integrity, and both the heirs are to equally enjoy half and half alike the whole 'estate' with unanimity with my elder son Pallonji in such a way as not to injure his (Pallonji's) right."

Up to this point in the Will there can be no doubt whatsoever that the property of the estate was effectually and equally divided between these two sons. There then follow, however, the clauses which are said to create difficulty. They are these:—

"At present my elder son Fallonji has no male issue of his body. (He) has only a daughter. Therefore, if my elder son Pallonji gets a male issue, half of the 'estate' is to be made over to him, on his attaining (his) full age."

And it may be proper that the 11th clause of the Will should be quoted in full. It reads thus:—

"I, the testator have in the second clause of this Will appointed my two sons Pallonji and Jehangirji as my heirs. The wife of Pallonji, the elder of them, has now gone to her father's house. On her return, if she, by instigating her husband, or by any (other way) cause to be mortgaged, sold, given in gift, charity, etc., or disposed of, whatsoever in any way to any one, any immovable and moveable 'estate,' etc., appertaining to the half share during the life-time of my son Pallonji or, after his death, which God forbid, my son Pallonji or his wife, or daughter or any (other person) (shall) as stated in the third clause of this will have no authority, power and right so to do. If my son Pallonji does not get a son, my son Jehangirji is to give away his son as Pallonji's *palak* (or his adopted son). All the clauses of this will are applicable to the said adopted (son). If a son be born of the body of Pallonji he shall on his attaining (his) full age be the owner of half share in the whole of the immovable and moveable 'estate' belonging to me. My heir (and) Vakil (or executor) Jehangirji, or his heirs shall raise no objection to give him the share. If they raise any objection, the responsibility arising therefrom is on their heads. All the clauses written in this will are applicable to the said son of (his body)."

The material facts of the case are that the testator having executed this Will on 8th August, 1866 died within a fortnight thereafter, *viz.*, on 21st August 1866. He was survived by his two sons. Pallonji, the elder, was of weak intellect as the Will indicates. Jehangirji entered upon the management of the whole estate, having obtained Probate of the Will in 1867. This state of matters lasted for thirty years, *viz.*, till 1897, when Pallonji died. Pallonji was twice married but had no son. He left a widow and other representatives who are respondents in this appeal and are his heirs according to the Parsi Intestate Succession Act. The nature of the suit by these heirs is for an account, for an ascertainment of the rights and interests of the parties in the estate and for partition, and the claim is grounded on the right of Pallanji as, it

is contended, the owner of one half of the estate from the date of the testator Dadabhoy's death.

One other fact may now be mentioned, *viz.*, that it is alleged, that on 3rd December, 1886 Pallonji adopted, as his *palak*, Byramji his nephew, and son of Jehangirji. Jehangirji and his son Byramji resist the suit, maintaining that Byramji as *palak*, or adopted son of Pallonji, succeeds in terms of the settlement to the half of the estate which Pallonji so long enjoyed. It is, of course, also maintained that under the terms of the settlement Pallonji never was owner of the one-half of the estate, or, as it would be expressed in English phraseology, the terms of the Will were such as to prevent vesting in Pallonji.

The learned Judges of the Court below have not only dealt with this question but with certain others, including the special situation of Byramji as *palak* of his uncle. The points among others discussed were (1) whether such a *palak* could ever take under the Will, looking to the fact that it remained uncertain until Pallonji's death that the condition of a *palak* taking could ever be purified, *viz.*, that Pallonji should die without a son, and (2) the peculiar point as to the office of a *palak* to a Parsi becoming effectual only three days after the adoptive father's death. (3) A further question was keenly argued, *viz.*, whether the will contained in itself sufficient words of grant or gift to the *palak*.

In the view taken of this case by their Lordships these questions, however interesting, are not necessary for the decision about to be pronounced. For their Lordships are clearly of opinion that under the terms of Dadabhoy Byramji's Will one-half of the estate conveyed vested in Pallonji *a morte testatoris*. The result of the argument presented would be that if Pallonji had had a son who reached twenty-one during his father Pallonji's life, then in that event that son would have taken so as to cut out Pallonji from all rights under this will. The right of Pallonji would accordingly be restricted to that of enjoyment, not even for life, but until the majority of his own son. Their Lordships cannot agree with such a construction.

The destination over to a son, who should take upon attaining twenty-one years of age, would appear to their Lordships to be language appropriate to the

events of the death of Pallonji during the life-time of the testator and of his having left a son—the situation also being provided for of that son being at that period of time under twenty-one.

But when the father Pallonji himself survived the testator, it does not appear to their Lordships that there are any words in the Will sufficient to cut down the right of Pallonji to one-half of the estate to a tenancy for life therein, or for a less period, according to the argument. On the contrary, the words employed seem to fit the case of the entire estate being on the testator's death divided into two portions, and of each portion becoming then the absolute property of one of the two sons.

While these are the general principles which would be applicable in the construction of such a Will, in their Lordships' opinion the same result is precisely reached by the application of Section 111 of the Indian Succession Act. Their Lordships agree with the view that has been taken as to the applicability of that section in the Courts below. No further question, this being so, need be dealt with.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed, and that the appellants will pay the costs.

T. S. N. & S. A. R. *Appeal dismissed.*

Solicitors for Appellants—T. L. Wilson & Co.

Solicitors for Respondents 1 and 2.—Ranken Ford, Ford & Chester.

**** A.I.R. 1914 Privy Council.**
(FROM BOMBAY)

18th November, 1914.

LORDS DUNEDIN AND SHAW AND
Mr. AMEER ALI.

Hamabai Framjee Petit—Defendant.
Appellant

v.

Secretary of State for India—Plaintiff.
Respondent.

Privy Council Appeals Nos. 139 and 140 of 1913.

**** Land Acquisition Act**—Government granting land subject to their being resumable for public purposes—Test of "public purpose" is, the general interest of the community as opposed to the particular interest of the individuals—Resuming lands for erecting buildings for

the use of Government Officials is for a public purpose.

The Government had granted lands subject to their being "at any time resumable by Government for public purposes." They resumed these lands for the purpose of erecting buildings thereon for the use of their officials.

Held, the phrase "public purpose" must include a purpose that is an object or aim in which the general interest of the community as opposed to the particular interests of the individuals is directly and vitally concerned. The resumption of lands for erecting building for the use of Government officials is for public purpose as it will redound to public benefit by helping the Government to maintain the efficiency of its servants. [P. 21, C. 2 & ; P. 22, C. 1]

Where the Judges of the High Court who were thoroughly conversant with the conditions of Indian life held that the scheme would redound to the public benefit by helping the Government to maintain the efficiency of its servants, the Privy Council would be slow to differ from such a conclusion.

The decisions which construed the words "public purposes" as used in the statute of Elizabeth with reference to exemption from rating afford little help in construing the words in these grants. [P. 21, C. 2.]

Prima facie the Government are good Judges though not absolute Judges of the question whether the purpose in the case is one in which the general interest of the community is concerned. [P. 21, C. 2.]

DeGruyther, Henry A. Mc Cardie and *Kenworthy Brown*—for Appellants.

E. Richards and *G. R. Lowndes*—for Respondents.

Lord Dunedin:—The same general point is raised in these two appeals.

The first appellant was lessee under the Government as successors of East India Company under a lease of date 18th April, 1854, which lease contained a power of resumption in favour of the lessor if "the Company, their successors or assigns, shall, for any public purpose, be at any time desirous to resume possession of the premises granted" . . . upon certain terms as to notice and compensation.

The second appellants are holders of land under Government in virtue of a *sanad* originally granted to one George King on 6th April, 1839, by the said East India Company, which declares the ground given in occupation is to be "at any time resumable by Government for public purposes" upon certain terms as to notice and compensation.

The Government gave notice in both cases to resume for a public purpose. On being challenged as to what that public purpose was, they explained that they wished for the ground in order to erect dwelling

houses, which they could offer to Government officials at adequate rents for their private residence. Suitable houses for Government servants are not easily obtainable in Bombay; but it is not said that obtaining quarters of some kind is an impossibility. The whole question, therefore, is: Is such a scheme a "public purpose" within the meaning of the contracts contained in the lease and the *sanad*?

The learned Judge of First Instance in the High Court of Judicature at Bombay and the Appeal Court of the same Court have both held that it is. The learned Judges in the Courts below have, in deference to citations made before them, elaborately considered many of the decisions which construed the words "public purposes," as used in the Statute of Elizabeth with reference to exemptions from rating. In the end, however, they came to the conclusion that those decisions afforded no help as to the proper construction to be put on the words of these contracts; and in that conclusion, their Lordships unhesitatingly agree.

The argument of the appellants is really rested upon the view that there cannot be a "public purpose" in taking land if that land when taken is not in some way or other made available to the public at large. Their Lordships do not agree with this view. They think the true view is well expressed by Batchelor, J., in the first case, when he says:—

"General definitions are, I think, rather to be avoided where the avoidance is possible, and I make no attempt to define precisely the extent of the phrase 'public purposes' in the lease; it is enough to say that, in my opinion, the phrase, whatever else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned."

That being so, all that remains is to determine whether the purpose here is a purpose in which the general interest of the community is concerned. *Prima facie* the Government are good judges of that. They are not absolute judges. They cannot say: "*Sic volo sic jubeo*," but at least a Court would not easily hold them to be wrong. But here, so far as from holding them to be wrong, the whole of the learned Judges, who are thoroughly conversant with the conditions of Indian life, say that they are satisfied that the scheme is one which will redound to public bene-

fit by helping the Government to maintain the efficiency of its servants. From such a conclusion their Lordships would be slow to differ, and upon its own statement it commends itself to their judgment.

Their Lordships are therefore of opinion that on the general point the view of the Courts below was right.

A special point was taken in the second case as to sufficiency of notice. It is enough to say that the view of the Courts below was clearly right in this matter.

Their Lordships will humbly advise His Majesty to dismiss the appeals, but there will be no costs to either party before this Board.

T. S. N.

Appeal dismissed.

Solicitors for Appellants:—(1) T. L. Wilson & Co. and (2) Latteys and Hart.
*Solicitors for Respondent:—*Solicitor, India office.

A. I. R. 1914 Privy Council. (FROM CALCUTTA)

21st October, 1914.

LORDS DUNEDIN, ATKINSON AND SUMNER,
SIR JOHN EDGE AND MR. AMBER ALI.

*Secretary of State for India—*Defendant-Appellant

v.

*Kirtibas Bhupati Harichandan Mahapatra—*Plaintiff-Respondent.

Privy Council Appeals Nos. 90 and 91 of 1913.

(a) *Bengal Chowkidari Act (VI of 1870), S. 1—The term assigned applies to lands assigned by Government or appropriated under its authority or with its permission—Right of Government to resume lands in Zamindari—Cannot be exercised unless it had reserved to itself that right in the sanad granted to the Zamindar.*

The word "assigned" in Section 1 means lands assigned by 'Government' or appropriated under its authority or with its permission. The expression is applied only to lands assigned by Government for the maintenance of Chowkidars and in respect of which they reserve the right to resume and transfer to the Zamindar subject to an additional assessment.

To claim the right to resume, the Government has to prove that it had reserved to itself the right when the sanads were granted to the Zamindars. But with regard to the lands, in the Zamindari, the Zamindars, as such have a *prima facie* title to the full enjoyment of every parcel of land with in their Zamindars, for which they pay revenue

to Government. As such the Government have no right to claim resumption of chowkidari chakran lands in a Zamindari, granted by the Zamindar himself and which had not been taken excluded from assessment as chowkidari lands at the time of settlement. The Provisions of Act VI of 1870, do not authorise such a claim by the Government.

(b) *Service Tenures—Lands given to officers charged with police duties in rural areas—Existence of chowkidari chakran lands in Bengal at the time of the Decennial Settlement—The Decennial Settlement of Bengal divided chakran into two classes (a) Tannahdary lands resumable by the Government and (b) all other chakran lands held by public officers or private servants and responsible for the public revenue—Reg. 1, S. 8, Cl. 4 and S. 41 of Regulation VIII of 1793; the Government had reserved to itself the right of resumption in lands appropriated by Zamindars under its authority and which were not taken into account in the assessment of revenue.*

It has been customary in India to remunerate officers charged with certain public or Quasi public duties by grants of lands to be held either rent-free or at a reduced rent. One of the best known examples of these service tenures is the grant of lands in lieu of wages to individuals who were charged with the performance of police duties in rural areas, and is known as chowkidari chakran lands. Prior to the British possession of India, Zamindars were entrusted with the defence of the territory against foreign enemies, as well as, with the administration of law and maintenance of peace and order within their district, and for this purpose they employed not only armed retainers to guard against hostile inroads but also a large police force and other officers in great numbers, under the name of *chowkidars*, *pykes* and other descriptions, as well for the maintenance of order in particular villages and districts as for the protection of the property of the Zamindars, the collection of his revenue and other services personal to the Zamindar. All these officers were servants of the Zamindar appointed by him and removeable by him and were remunerated by the enjoyment of land rent-free or at a low rent in consideration of their services. These service or chakran lands were of great extent in Bengal at the time of the Decennial Settlement, and the effect of that settlement was to divide them into two classes. (a) *Tannahdary* lands which were made resumable by the Government, in as much as, the Government took upon itself the maintenance of the general police force. (b) all other *chakran lands* held by public officers or private servants in lieu of wages, annexed to the *malguzary* land, and declared responsible for the public revenue. Under Clause 4 of Section 8 of Regulation 1 and of Section 41 of Regulation VIII of 1793, the power of "option" of resumption was reserved in respect of those lands that had been appropriated by the zamindar, with the permission or under the authority of Government for the purpose of remunerating the chowkidars for their services, lands though included in the Mahal were not taken into consideration for the assessment of revenue,

E. Richards and *A. M. Dunne*—for Appellant.

DeGruyther and *B. Dube* — for Respondent.

Mr. Ameer Ali.—The plaintiffs in the two actions which have given rise to the present appeals are respectively the zamindars of Sukinda and Madhupur in the Province of Orissa, and the question for determination relates to certain lands included in their estates in respect of which the defendant, the Secretary of State for India in Council, claims to exercise the right of resumption and assessment by virtue of the provisions of Act VI of 1870 of the Bengal Council.

The facts of the two cases are set out with great clearness in the judgments of the High Court of Bengal, and do not, therefore, require a detailed statement. Their Lordships propose to give only a brief sketch of the circumstances which have culminated in the present litigation.

It appears that the predecessors of the two plaintiffs had been in possession of their estates from a time long anterior to the establishment of British power in that part of the country. The origin of their title under British rule is intimately connected with the political history of the province. Orissa consists of three well-defined tracts; in the middle lies a level open country inhabited by a settled population. Here the Moguls in the reign of Akbar introduced their revenue system with its regular assessment of public dues. These territories were consequently designated the *Mogulbandi* which is defined in Regulation XII of 1805 as.

“being that part of the District of the Zillah of Cuttack in which, according to established usage, as in Bengal, the land itself is responsible for the payment of the public revenue, and in which every landholder holds his land subject to the conditions of that usage.”

The wild and hilly tract on the west, and the low marshy lands along the seashore to the east were held by a number of chiefs who, under the designation of *rajas*, *zamindars*, and *khandaits*, were allowed to exercise a feudal sway in their respective *jagirs* on payment of a fixed tribute to the Imperial Government. These outlying parts of the Province were usually called the *Rajwara*. The zamindaris of Sukinda and Madhupur lay within the *Rajwara* and outside the *Mogulbandi* territories. Shortly before the

acquisition of the Dewanny by the East India Company, the Mahrattas had obtained possession of a large tract to the south of Suvarnarekha river, including the *Rajwara* and thus, when the Company obtained the virtual Government of Bengal, Bihar and Orissa, under Shah Allam's grant, the *de facto* British possession of the latter province did not extend beyond the Suvarnarekha to the south of Midnapore.

In 1803, the Mahratta Raghoji Bhonslay, who held southern Orissa, came into collision with the forces of the East India Company, and in the October of that year the country south of the Suvarnarekha river was occupied by British forces. The settlement of the newly-acquired territories was entrusted to Colonel Harcourt, who commanded the Company's troops, and a civil officer of the name of Mr. Melville. They were designated Commissioners, and they appear to have done their work with great thoroughness. In this settlement were included the zamindars of Sukinda and Madhupur, to whom sanads were granted entitling them to hold their estates at a fixed *jama* in perpetuity. These two *zamindaris* were then brought within the *Mogulbandi* and subjected to the general regulations in force in Bengal.

Later in the year came the treaty of Deogaun, by which Bhonslay ceded a considerable tract of country belonging to the hill chiefs. With these, agreements or *kaulnamas* were entered into guaranteeing the perpetual enjoyment by them of their properties on definite terms. The zamindar of Sukinda alleged in his suit that he also held under a *kaulnama* but he failed to establish his allegation, which was evidently made under some misapprehension.

There is no doubt, however, that a settlement was made with, and a *sanad* granted to, him by the Commissioners, the terms of which will be referred to in the course of this judgment.

By Section 33 of Regulation XII of 1805 statutory confirmation was given to the *sanads* of the two plaintiffs' ancestors. The lands in dispute admittedly form part of the estates settled with the plaintiffs' ancestors in 1803 and in respect of which the revenue was fixed in perpetuity. The plaintiffs accordingly urge that the Collector representing the defendant has

not have been necessary to give *in extenso* the above sections.

Bengal Act VI of 1870 was, when enacted, not introduced into Orissa; its operation was confined to Bengal where the category of lands referred to in Lord Kingsdown's judgment largely existed.

In 1899, the Act was, by a resolution of the Government of Bengal, dated the 9th of February, 1897, extended to Orissa.

It appears that the plaintiffs, the zamindars of Sukinda and Madhupur respectively, in discharge of the duties imposed on them by their *sanads* to maintain peace and order within their estates, retained in their service a large number of *chowkidars* whom, according to the custom of the country, in lieu of wages they remunerated by grants of land. A register of these *chowkidars* was kept in the zamindari office, and it would appear that in the appointment of the *Chowkidars* in more than one instance the Government police-officer had a voice. But the records show that the zamindar often charged the lands held by these men, and resumed what he considered to be in excess of their requirements. Such was the condition of affairs in these two *zamindaris* when the Act was made applicable to Orissa.

Shortly after its extension, the Collector of the Cuttack District proceeded to apply its provisions to the lands held by the *chowkidars* of Sukinda and Madhupur respectively, on the ground that they were *chowkidari chakran lands* within the meaning of the Act. The plaintiffs protested strongly against his proceedings: whilst expressing their willingness to submit to any reasonable contribution that might be required of them for the payment of the *chowkidars* who were to be appointed under the new system, they took exceptions to the Collector's attempts to resume and assess or re-assess their lands, and to transfer the same to them. Their objections were rejected, and the lands were then attached and put up to sale under the provisions of Sections 54 and 55 of the Act.

The plaintiffs thereupon brought these actions in the Court of the Subordinate Judge of Cuttack, in substance, for a declaration that the Act did not apply to the lands in suit, and for an injunction restraining the defendant-appellant from interfering with them,

The two suits were tried by two different Subordinate Judges, who affirming the contention of the Collector that the lands in dispute were *chowkidari chakran lands*, dismissed the actions. On appeal, the High Court of Bengal, after an exhaustive examination of the subject, reversed the decisions of the first Court and granted the plaintiffs the relief they sought.

The Secretary of State for India in Council has appealed in both actions; and it has been contended on his behalf that the learned Judges of the High Court were in error in referring to the previous legislation in order to construe Bengal Act VI of 1870; that the Act was applicable to all lands whether "assigned" by Government or by the zamindar for the maintenance of *chowkidars*; and that the onus was on the plaintiffs to show that they were not *chowkidari chakran lands*. Their Lordships think that this argument proceeds on a manifest fallacy. The lands in dispute admittedly lie within the ambit of the estates settled with the plaintiffs' ancestors.

The respondents are the zamindars and "as such they have the *prima facie* title," to use the language of this Board in the well-known case of *Rajah Sahib Perhlad Sein v. Rajendra Kishore* (2), to the full enjoyment of every parcel of land within their zamindaris for which they pay revenue to Government. It rests on the defendant to show that when the zamindaris were confirmed to the plaintiffs' ancestors it was subject to reservations in respect of any land which gave Government the power of resuming and assessing it. That onus the defendant has not discharged; in fact it is not now contended for him that there was any such reservation. The power of resumption was, as already remarked, reserved by Government by the old Regulations in respect of lands which had been set apart by the zamindars with its permission or under its authority.

In Regulation I of 1793 the word used is "appropriated"; in Regulation XIII of 1805, the expression "assigned" is employed; but in both statutes the characteristics of the grants under which the

(2) [1869] 12 M.I.A. 292=2 B L.R. 111=12 W.R. 6=2 Sar. 430=2 Suther. 225=20 Eng. Rep. 349 (P.C.).

lands were held depend on the implied authorisation of the Government which excluded them from consideration in the adjustment of the *jama* of the Mahal. In the present case the defendant has failed to show that any parcel of land was not taken into account in fixing the rent respectively payable by the plaintiffs, nor that there was any obligation on the part of the plaintiffs to make such grants. The only obligation on them was to maintain peace and order within their zamindaris. They entertained the services of *chowkidars* for whose maintenance they allotted from time to time certain lands of their own free will. The mere fact that some appointments were made with the approval of a Government officer cannot alter the nature of the grants.

In their Lordships' opinion the word "assigned" in the definition section of Bengal Act VI of 1870 means lands "assigned" by Government or appropriated under its authority or with its permission. Not only does the form of the "Transferring Order" in Schedule C of the Act clearly show that the expression "assigned" is applied to lands "assigned" by Government, as explained above, for the maintenance of the *chowkidars* and in respect of which they reserved the right to resume and transfer to the zamindar subject to an additional assessment, but the resolution by which the Act was extended to Orissa leaves no possibility for doubt what the Government understood the Act to mean. Their Lordships do not propose to burden their judgment with long quotations from this interesting document; they only wish to refer to two passages which appear to them to place the matter beyond doubt. In one place the Lieutenant-Governor after reviewing the whole subject says:—

"As already remarked, the *Chowkidari Jagirs* are State grants. They are excluded in the temporarily settled estates from the settlements made with the zamindars, while in the permanently settled estates they cannot be legally interfered with by the zamindars. The latter have thus in both classes of estates no connection with the *Jagir* lands, and the Lieutenant-Governor accepts the view that they are under no obligation to furnish lands or otherwise specially provide for the maintenance of the *Chowkidars*. Their liability is to contribute to any funds raised in the same manner as other residents of the villages. Nor is it binding on the Government to continue the *Jagir* grants for all time."

In the orders that are passed, a distinction is made with regard to the *chowkidari*

holdings in the temporarily settled tracts, and those situated in "permanently-settled estates." With regard to these it is declared that on resumption "the holdings should be included in the estates within which they lie, and form part of its assets in the future."

Nothing can be clearer in their Lordships' view that the Act was designed to deal with lands which, although lying within a Mahal, did not form part of its assets, which is not the case with the zamindaris of Sukinda and Madhupur.

Their Lordships are of opinion that the judgments and decrees of the High Court should be affirmed and these appeals dismissed with costs. And they will humbly advise His Majesty accordingly.

T. R. R. *Appeals dismissed.*

Solicitors for Appellant—The Solicitor, India Office.

Solicitors for Respondents—Barrow, Rogers & Nevill.

A. I. R. 1914 Privy Council. (FROM CALCUTTA)

25th November, 1914.

LORDS DUNEDIN AND SHAW, SIR
JOHN EDGE AND MR. AMEER ALI.

Mahomed Musa and others—Plaintiffs-Appellants

v.

Aghore Kumay Ganguli and others—Defendants-Respondents.

Privy Council Appeal No. 10 of 1912.

(a) *Mortgage—Equity of Redemption is extinguished by a compromise between the parties to the mortgage—Bar to further suit—Civil P.C., S. 11.*

Where parties to a mortgage settle their claims under it, by a compromise under which the mortgage-debts were to be thenceforward for ever extinguished and that the property itself was to be divided among the parties in specific shares, and a decree is passed in terms of such a compromise, a subsequent suit for redemption is barred.

[P. 29, C. 2.]

(a) *Part performance—Part performance of a compromise will remedy all formal defects.*

Even where the parties to a mortgage settle their claims under it by a compromise by which the mortgage-debts were to be extinguished and the property itself was to be divided among the parties in specific shares and even though the *Razinama* and the decree taken together may be considered to be defective or inchoate as elements making up a final and validly concluded agreement for the extinction of the equity of redemption, the subsequent actings of the parties may be such as to

supply all such defects. "Equity will support the transaction though clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. (8 A. Cases. 467. Rel. on) [P. 29, C. 2, P. 30, C. 1.]

DeGruyther and *B. Dube*—for Appellants.

Upjohn and *A. M. Dunne*—for Respondents.

Lord Shaw :—This is an appeal from a judgment and a decree of the High Court of Judicature at Fort William in Bengal, dated the 16th June, 1909. That judgment was pronounced upon and reversed a judgment and decree of the Second Subordinate Judge of the 24 Parganas dated the 31st August, 1908.

The object of the suit is the redemption of two mortgages, dated 22nd July, 1848 and 4th April, 1871. The defence which has been sustained is that the right to redeem was extinguished many years ago, in circumstances which will now be mentioned.

Many of the facts of the case are comprised in a chapter which may be said to have definitely closed in the year 1873; and it is accordingly unnecessary to narrate them in detail. After the 1848 mortgage was granted by one Fazlul Karim, his wife Khodajannessa obtained from him a conveyance of her husband's zemindary as a gift in lieu of dower. This occurred in 1850. In 1851 she began proceedings for redemption of the mortgaged properties. Many and various legal steps took place in that decade, and from at least the year 1863 no record remains of any proceedings in the suit. It is admitted that no useful light can now be thrown upon that litigation, which, in any view, appears never to have been determined.

In 1870 a certain agreement was executed by Khodajannessa Begum and three sons of one Ram Chand Mukerji in reference to the 1848 mortgage. A sum was fixed as the principal due and another sum as interest due, and arrangements were made for payment by yearly instalments and for management of the property and the like. On the 4th April, 1871, the second mortgage was granted. In 1873 differences, however, arose between Khodajannessa and the mortgagees, and a suit was brought by Ram Chand Mukerji's three sons to enforce the agreement come to. This suit was compromised. On the 26th November, 1873

Khodajannessa entered into a *vazinama*, or agreement of compromise, which *vazinama* was signed by the plaintiffs. What happened under it may be expressed in Khodajannessa's own words in evidence given by her in a litigation in 1875, and printed on the record. In that suit on 30th April she testified as follows:—

"The suit in the 24 Parganas Court was settled and a solenama executed by the three brothers, a deed of compromise, what is termed a *vazinama* and *safinama*. On my agreeing to execute a conveyance of the 12 annas share to the three brothers, it was settled. The three brothers and myself all agreed and made the settlement. I spoke to all the three brothers on the subject of that settlement."

The *vazinama* contains a full narrative of the transactions with the property mortgaged, and of the financial embarrassments which had occurred. It appeared as was the fact, that after the death of the *putnidar* of the property the realisations of the rents had come under the charge of the Court of Wards. And the true point so far as the present litigation is concerned, of the *vazinama* was this, that it was arranged that from the year 1874 onwards the realisation of *malikhana* profits should be as follows:— To the plaintiffs in that case and Arun Prokash Ganguli "the *malikhana* profits in respect of 12 annas, 7 *gundas* 2 *karas*, 1 *kag* share and the Collectorate revenue both amounting to Rs. 27,386-7-10 as per account given above, and I shall realise the profits in respect of the remaining 3 annas 12 *gundas*, 1 *kara*, 3 *kags* share and Collectorate, revenue both amounting to Rs. 8,013-8-10 *kist* by *kist* according to the terms of the *kabuliyat*." The other parties named were to get their names registered in the Collectorate. These parties, it may be mentioned, had expressly "consented to such arrangement and released the said *taluks* and all the properties covered by the mortgage-deed to me free from the liability for the debt."

It is impossible to read this *vazinama* without concluding that the mortgage-debts were to be thenceforward for ever extinguished, that the property itself was to be divided among the parties in specific shares, and that with regard to one share—set forth as 3 annas, 12 *gundas*, 1 *kara* and 3 *kags*—it was to become and be dealt with by Khodajannessa as her separate property disburdened of debt. The remainder of the 16 annas was also to be

similarly and separately owned and enjoyed.

The concluding prayer of the *vazinama* was :—

"That the Court may be pleased to decide the suit declaring that the plaintiffs shall get the amount claimed to their satisfaction in the manner stated above."

The *vazinama* was accordingly produced to the Court, which pronounced upon it as follows :—

"It is therefore ordered that the suit be decided in pursuance of the terms of the *vazinama*, and that the suit be struck off from the list of pending cases."

The point which is made against giving effect to this compromise is that a conveyance was not made by Khodajannessa in completion of the contract of purchase narrated in the *vazinama*. This is true. But no written conveyance by the Law of India was at the date of that transaction necessary, the Transfer of Property Act not being passed until the year 1882. But even if a transfer in writing had from a conveyancing point of view been omitted, or if some other formal defect had occurred, their Lordships are of opinion that this would have been unavailing to the appellants in the attempt made in the present suit to redeem the mortgages. For the points against opening up the transaction are manifold, and are in their Lordships' opinion conclusive. The compromise has been acted upon by all the parties to it, and by their successors-in-title from that date to this. The suit was dropped, the division of shares of the property was made, and it may be said generally that from its date until the date of Khodajannessa's death in the year 1890, and, indeed, from that date until the present time, the property has been managed upon the footing of that division, of the extinction of the mortgage-debts, of the division of the disburdened proprietary interests in the shares set forth in the compromise, and of the receipt and enjoyment of rents and profits accordingly. The details need not be given. As to Khodajannessa herself, her own view is set forth in her evidence as already given. A striking instance of her approbatory acting, or homologation, may be mentioned. In the same year, 1875, she executed a mortgage for her own 3 annas share, and in this deed she recites at length the whole transactions the separation into shares and so forth.

Transactions of mortgage, sale, etc., have been also carried out by the other sharers with reference to their properties. And, in short, it may be said that for a period of between 30 and 40 years prior to the initiation of this suit the rights of all parties have been dealt with precisely upon the same footing as if Khodajannessa had made an express conveyance parting with the equity of redemption, and transferring allotted shares of the property itself to the mortgagees, and reserving one share to herself. In these circumstances their Lordships are of opinion that the proposition that the equity of redemption still remains with the representatives of Khodajannessa cannot be maintained. Even if the *vazinama* itself was insufficient, yet in their Lordships' view the decree of the Court, to the sufficiency of which an objection was taken in argument, was obtained upon one footing, and one footing alone, *i. e.*, that the parties to the suit had in fact arranged their rights in the property in terms of the compromise.

Their Lordships, in view of the argument strongly pressed upon them, think it right further to say that even although the *vazinama* and the decree taken together were considered to be defective or inchoate as elements making up a final and validly concluded agreement for the extinction of the equity of redemption, the actings of parties have been such as to supply all such defects. To use language common from very early times in Scotland, and highly approved in the case of *Maddison v. Alderson* (1), in the House of Lords, it is no doubt true that there is a *locus penitentiæ*, that is,

"a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite and has not yet been adhibited in an authentic shape."

This is the situation where the parties stand upon nothing but an engagement which is not final or complete. But where the actings and conduct of parties are founded on, then in all such cases, to use the language of Professor Bell in his *Principles* (10th Ed.), Section 26,

(1) [1883] 8 A. C. 467=52 L. J. Q. B. 737=47 J. P. 821=31 W. R. 820=49 L. T. 303,

"*rei interventus* raises a personal exception, which excludes the plea of *locus penitentiae*. It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect, provided they are unequivocally referable to the contract and productive of alteration of circumstances, loss or inconvenience, though not irretrievable."

Their Lordships do not think that there is anything either in the law of India or of England inconsistent with it, but, upon the contrary, that these laws follow the same rule. In a suit, said Lord Selborne in *Maddison v. Alderson* (1) founded on such part-performance (and the part-performance referred to was that of a parol contract concerning land) the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. The Lord Chancellor then enumerates a series of acts referable to the parol contract, and he adds, "the matter has advanced beyond the state of contract; and the equities which arise out of the state which it has reached cannot be administered unless the contract is regarded." Many authorities are cited in support of these propositions from English and Scotch law, and no countenance is given to the proposition that equity will fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. From these authorities one dictum quoted by Lord Selborne from Sir John Strange in *Potter v. Potter* (2) may be here repeated: "if confessed, or in part carried into execution, it will be binding on the parties and carried into further execution as such in equity." Their Lordships do not think that the law of India is inconsistent with these principles. On the contrary it follows them.

A review by their Lordships of the judgment of the learned Judges of the High Court of the case has convinced them that the facts have been correctly appreciated, and they concur with the legal result arrived at. Their Lordships

will humbly advise His Majesty that the appeal should be dismissed with costs.

T. R. R. *Appeal dismissed.*

Solicitors for Appellants—T. L. Wilson and Co.

Solicitors for Respondents—Burton, Yeates and Hart.

A. I. R. 1914 Privy Council.

(FROM CALCUTTA).

2nd November, 1914.

LORDS DUNEDIN AND SHAW, SIR JOHN EDGE AND MR. AMEER ALI.

Dhiraj Chandra Bose and another—
Defendants-Appellants

v.

Sm. Hari Dasi Debi and another—
Plaintiffs-Respondents.

Privy Council Appeal No. 64 of 1913.

Bengal Revenue Sale Law (II of 1859)—
Arrears of embankment charges ordered to be denied under Certificate Act—Sale for such arrears under Act II of 1859 is liable to be set aside.

The High Court held that arrears of embankment charges (pulbandi) ordered to be levied under the Certificate Act were taken out of the purview of Act II of 1859 unless and until fresh notices were issued under Section 5 and a sale for such arrears held under Act II of 1859 is liable to be set aside.

Held, (on appeal to the P. C.) that the judgment of the High Court should be confirmed.

FACTS.—The plaintiff, a pardanashin lady purchased an eight anna share of *mahal* Gunosipota No. 944 Touzi in the Midnapur Collectorate at a Civil Court-sale on 21st September, 1904. The eight annas share was a separate revenue-paying estate known as separate account No. 1. There was an arrear in the kist for January, 1907 and on 25th March, 1907, the plaintiff applied to the Collector praying for exemption from sale of the said share upon payment of the revenue in arrear. On this the Collector endorsed, "may be accepted if paid to-day." The plaintiff's Karpardaz thereupon went to the arrear collection mohuriz for information as to the Government demands due which were required to be paid. The information given to him was that Rs. 807 was the total amount due and this sum was deposited on the same day.

It appeared that a certificate which had been issued against the plaintiff for Rs. 69-13-9 for arrears of embankment charges (pulbandi) was not mentioned to the plaintiff's agent and accordingly was not paid. On the following day, 26th March the estate was put up for sale under Act II of 1859 and not under the certificate and sold for the nominal price of Rs. 500, the property being valued at Rs. 50,000. The defendant No. 2 purchased it and subsequently sold it to defendant No. 1. The plaintiff's appeals to the commissioner and to the Board of Revenue were dis-

(2) (1750) 1 Ves. Sen. 437.

missed and she therefore brought this suit to cancel the alleged Revenue sale.

The trial Court dismissed the suit but the suit was decreed by the High Court which held following 21 C. 70 P. C. that the sale as held on 26th March, 1907, was not a sale for arrears of land revenue and that it was not competent to the Collector to hold such a sale under Act II of 1859. The High Court held that when the Collector has acknowledged payment in full of the arrears of land revenue for which the sale was advertised and has elected to proceed by certificate procedure against an arrear of a different character and has already directed a sale under that procedure he cannot turn round and treat the arrear under the certificate as an arrear of land revenue, without any notice to the parties under Section 5, and proceed to sell the property under the land Revenue Proclamation on the mere ground that no special exemption order has been passed. The embankment charges ordered to be levied under the certificate are taken out of the purview of Act II of 1859 unless and until fresh notices are issued under Section 5 and they cannot be treated as arrears of Land Revenue. The sale therefore not being for an arrear of land Revenue was liable to be set aside. From this Judgment of the High Court, the defendants appealed to the Privy Council.

A. M. Dunne—for Appellant.

Respondents—*Ex parte*.

Lord Dunedin:—This is an appeal heard *ex parte*, and whenever this is the case it is a matter of considerable anxiety to the Board. But in this appeal that anxiety was certainly relieved by the exceedingly fair and candid way in which it was presented by the learned counsel for the appellants. In the result, upon a full consideration of the circumstances, their Lordships see no reason for interfering with the judgment of the Court below.

They will, therefore, humbly advise His Majesty to dismiss the appeal.

S. A. R. *Appeal dismissed.*

Solicitors for Appellants—Watkins & Hunter.

****A. I. R. 1914 Privy Council.**

(FROM CALCUTTA)

23rd April, 1914.

LORDS MOULTON AND PARKER OF
WADDINGTON, SIR JOHN EDGE AND
MR. AMEER ALI.

Nalini Kanta Lahiri and another—Appellants

v.

Sarnamoyi Debya and others—Respondents,

Civil P. C., S. 11—Partition suits by co-sharers ending in decrees—Co-sharer party to them bound by them—Reason for same is the necessity to implead all co-sharers and every allotment of property is to that extent a decree against the other co-sharers—Partition.

A co-sharer of a Patni Talook who was a party to several suits brought by other co-sharers to have their share partitioned out by metes and bounds now sued for his proper share on the ground that the co-sharers had been allotted more than their proper share at his expense and the remainder was insufficient to represent his proper share of the Original Patni Talook.

Held: The previous partitions having been made by Judicial decrees in suits to which he was a party the matter was *res judicata* and could have been rectified only under the provisions of the Civil Procedure Code. In a suit for partition by a co-sharer, plaintiff is bound to make the other co-sharers defendants as the partition in his favour is a partition against his co-sharers and to that extent a decree against them as their right to the portion allotted to him which they would otherwise have is taken away. [P. 32, C. 1.]

DeGruyther and *Ross* — for Appellants.

B. Dube—for Respondents.

Lord Moulton :—In this case the original plaintiff (now represented by the appellants) was one of the co-sharers of a *Patni talook*. In past times, others of the co-sharers have been desirous to have their shares partitioned out to them, and have accordingly brought suits for that purpose. To every one of those numerous suits the appellant was a party, and the object of each of those suits was to have the share of the plaintiff in the suit partitioned out by metes and bounds. Those suits have gone on until every co-sharer other than the plaintiff has had his share thus partitioned out so that the plaintiff was left with the remainder as representing his share. In this suit he alleged that this remainder was insufficient to represent his share of the original *Patni-talook*. It is evident that on examination of the claims of previous plaintiffs, he had convinced himself, and so far as their Lordships know, convinced himself correctly, that in two cases the shares ascribed to other co-sharers were larger than those to which they were entitled, and that, accordingly, the partition gave them a larger share of the property than it ought to have done.

It is immaterial, in the opinion of their Lordships, whether this view which is put forward by the plaintiff in his plaint is correct or not, but their Lordships will assume for the purpose of this judgment,

that it is correct. The object of the present suit is to correct the apportionment to those of the previous plaintiffs, or co-sharers, who received more than their proper share so that the remainder will properly represent the plaintiff's share.

The Courts below have held that this suit cannot be sustained both on the ground of *res judicata* and on the ground of limitation. Their Lordships do not find it necessary to deal with the question of limitation, which was dealt with by both the Courts below, because they are of opinion that the plea of *res judicata* is a sufficient answer to the suit.

The case viewed from this point of view is an extremely simple one. If any co-sharer applies for a partition of a property he must make the other co-sharers defendants, because the partition which is made in his favour is a partition against his co-sharers. That which gives him a portion of the property takes away all right which they would otherwise have to that portion, and therefore it is a decree against them, and in favour of himself.

In the present case two groups of suits are referred to. The first comprises suits 25 of 1885, and 75 and 1885, and suit 5 of 1886. These suits were heard together and culminated in a decree which was a decree made in the three suits. It declared the shares of all those who in those suits sought partition. Commissioner was directed to go on the ground and to measure out the declared shares of those parties. That was done, and they were put into possession of these shares.

The decree was thus made in a partition suit in which the plaintiff was a defendant. It was therefore a decree against him in a suit to which he was a party. That being so their Lordships have no hesitation in saying that it became thereby *res judicata*, so far as he was concerned. Supposing any error was made in the partitioning out, his remedy lay in proceedings in that suit suitable to correct that error; and the Code of Civil Procedure provides adequate means for the correction of such error. But apart from such proceedings (none of which were taken by him) it is in their Lordships' opinion the clearest possible example of *res judicata*, a judicial decree made

against a party in a suit in which he is defendant.

Mr. Ross has attempted to draw a distinction between the partitions under this group of suits and that in the other suit to which exception is taken by the plaintiff, *viz.*, No. 231 of 1892. In that case a lady, who was not originally made a defendant, applied to be made a defendant, claiming that a certain portion of the share of her husband (who was a defendant to the action) was now possessed by her, and she was accordingly made a defendant. In such partition suits a defendant has a right to have his share also partitioned out, and she applied and her share was partitioned out. Mr. Ross has been unable to point out any irregularity in the procedure in that suit. He pointed out, with perfect justice, that in the plaint his client says that he was ignorant of her being made a party, and intimates that he was ignorant also of her having obtained a partition. But he admits that his client, must have known of the decree for partition, and certainly he knew that he was interested in the partitioning actually being carried out in that suit. But it is not necessary to enter into these matters. It suffices for the present judgment to say that no irregularity of any kind has been pointed out by the counsel for the appellants in that suit, and the consequence is that there is nothing to distinguish it from the previous cases with which their Lordships have already dealt.

Their Lordships are therefore of opinion that the action of the plaintiff is barred by the plea of *res judicata*, and accordingly they humbly advise His Majesty that this appeal should be dismissed with costs.

T. A. R.

Appeal dismissed.

Solicitors for Appellants—W. W. Box & Co.

Solicitors for Respondents—Barrow, Rogers & Neville.

***A. I. R. 1914 Privy Council.**

(FROM CALCUTTA)

17th May, 1914.LORDS MOULTON AND PARKER OF
WADDINGTON, SIR JOHN EDGE AND

MR. AMEER ALI.

Rai Dwarka Nath Sarkar and another—
Appellants

v.

Haji Mohamed Akbar and others—Res-
pondents.*** (a) Partnership suit—Accountability of
partners and duty to discover all relevant
documents in their possession.**In a suit for accounts between partners, each
party is bound to account to the best of his ability
and give full discovery of all documents in his
possession as to matters in dispute relating to the
partnership. [P. 33, C. 2]**(b) Accounts—Must be supported by proper
evidence such as partnership books and docu-**
ments.In a partnership suit, accounts taken by a Com-
missioner without production or discovery of the
partnership books and documents are not pro-
perly taken. [P. 33, C. 2]**(c) Practice—Contentions involving question
of fact put forward for the first time in appeal
should be rejected as too late.**A plea by the legal personal representatives of
a deceased partner who were not parties to a
reference to arbitration made by the other part-
ners in a dispute between the firm and a stranger
that the award was not binding on them being not
a pure question of law cannot be raised for the
first time in appeal [P. 33, C. 2.]**(d) Civil Procedure Code, Section 100—Bind-**
ing nature of award.Whether an award binds legal representatives
of one partner, where the other partner agreed to
refer to arbitration, dispute between partnership
and stranger is not a pure question of law—
Award.*Parikh—*for Appellants.*Respondents—Ex parte.***Lord Parker:**—This was a partner-
ship action instituted by the legal per-
sonal representatives of a deceased part-
ner against the surviving partners. By
the decree, dated 31st May, 1906, as vari-
ed by the order of the High Court, dated
26th March, 1907, it was directed that
the Commissioner be appointed for the
purpose of taking the accounts therein
referred to, being the usual partnership
accounts. The Commissioner made his
report on the 14th August, 1907 and
various objections to it were filed. On
the 24th September, 1907 the Subordinate
Judge overruled these objections and con-firmed and gave relief on the footing of
this report. The order of the Subordi-
nate Judge was appealed. On such
appeal two points were decided by the
High Court. In the first place such
Court decided that the report of the
Commissioner was unsatisfactory and
that the accounts as taken by him were
not properly taken or supported by proper
evidence and must be investigated afresh.
In this respect, after careful considera-
tion, their Lordships see no reason to
differ from the High Court. Without
going into detail, it will suffice to say that
the accounts were taken without produc-
tion or discovery of the partnership books
and documents. For the purpose of
working out a partnership decree each
party to the action is bound to produce
and discover all documents in his posses-
sion relating to the partnership, and an
application by the plaintiff in the action
for discovery of the documents in the
possession of the present appellants ap-
pears to have been refused.The second point decided by the High
Court stands on a different footing. It
appears that the partnership's firm had in
1903 entered into a contract with the
Secretary of State for India to construct a
bridge which was completed in due
course, but a dispute arose between the
firm and the Secretary of State as to the
amount payable to the firm under the
contract. The surviving partners, or one
of them, agreed with the Secretary of
State that this dispute should be referred
to the arbitrament of Mr. Sanders. The
legal personal representatives of the
deceased partner were not parties to the
reference. The arbitration resulted in
the award of a certain sum as payable to
the firm, and this sum has been paid and
brought into the partnership accounts.
On the appeal the legal representatives
of the deceased partner put forward for
the first time a contention that they were
not bound by the agreement of reference
or the award. The High Court upheld
this contention. In their Lordships'
opinion the High Court ought to have
rejected the contention as having been
put forward at too late a stage in
the proceedings. The question whether
the legal personal representatives were
bound by the agreement and award
was not a simple question of law, to
be decided without reference to the

facts of the case, or any evidence which might have been available. The original contract with the Secretary of State is not in evidence, and it is possible that it contained a submission binding on the legal personal representatives of the deceased partner. Even if it did not, and the agreement to refer was not originally binding on such legal personal representatives, it may have become binding on them by their acquiescence therein, or their acceptance of benefits thereunder. The point not having been raised prior to the hearing of the appeal, there has been no opportunity of ascertaining the relevant facts. Further, assuming that the agreement to refer was not binding on the legal personal representatives, it could hardly follow that they were entitled to relief on the footing that it was binding, but had been negligibly and improperly entered into. And lastly if relief could be given on this footing, why should the measure of damages be the difference between the amount originally claimed against the Secretary of State and the amount payable under the award, and why should the onus of proving that it was any less sum be thrown on the persons accused of negligent and improper conduct? In their Lordships' opinion, the decision of the High Court in these respects was erroneous.

Under the circumstances their Lordships will humbly advise His Majesty to discharge the order appealed from, and to remit the case to the High Court with directions that the Commissioner's Report and the order of the Subordinate Judge confirming the same be discharged, and the case sent back to the Subordinate Judge in order that the accounts may be taken on the basis of the order of 31st May, 1906 as varied by the order of the 26th March, 1907, and on the footing that every party is bound to account to the best of his ability and to give full discovery of all documents in his possession relating to the matters in dispute, the costs of the appeal to the High Court being made costs in the action, and the appellants being entitled to their costs of this appeal.

T. A.

*Case remanded.**Solicitor for Appellants:—E. Dalgado.*

A. I. R. 1914 Privy Council. (FROM ALLAHABAD)

23rd October, 1914.

LORDS DUNEDIN AND SHAW, SIR JOHN
EDGE AND MR. AMEER ALI.

Jhandu—Plaintiff-Appellant

v.

Tariff and others—Defendants-Respondents.

Privy Council Appeal No. 133 of 1913.

** Hindu Law—Reversioners—Suit by, for a declaration that certain alienations made by widow are good only for the period of her life—A remoter reversioner cannot bring such a suit when a nearer reversioner is alive and capable of maintaining an action.*

The appellant as a reversioner sued a widow for the recovery of possession of certain property. Prior to his suit, certain others, of whom one was admittedly a nearer reversioner than the appellant, had brought a suit against the widow and failed. It was contended that the appellant was at least entitled for a declaration that certain alienations made by the widow subsequent to the date of the prior suit were good only for the period of her life, especially because the nearer reversioner had already brought a suit and failed.

Held: The right to sue for such a declaration belonged only to the nearest reversioner except in cases where such reversioner had precluded himself from suing, in some way, by his own act or conduct, when a remoter reversioner might sue. But in the present case the appellant could not maintain the suit because

(i) it was a suit for possession and a prayer for declaration could scarcely be spelt out of it and

(ii) the nearer reversioner who had failed in the prior suit could not be said to have precluded himself from suing for such a declaration, as the conveyances had not been made at the date of the prior suit. [P. 35, C. 2]

B. Dube—for Appellant.

J. M. Parikh—for Respondents.

Lord Dunedin:—One Sukhram was an owner of property and died. He left behind him lady named *Musammatt Imirti* who was supposed to be his legal widow, having been married in the *Karao* form of marriage. If she was legal widow she was entitled to the life enjoyment of the property which Sukhram left.

In 1904 four persons called *Kehri*, *Kallu*, *Nihal* and *Mir Singh* raised an action against this lady alleging that they were the representatives of Sukhram. They further alleged that she was not a legal widow at all, and that accordingly they were entitled to possession of Sukhram's property. They were cast in that action because they failed to produce a proper pedigree which showed that they

were in the degree of relationship which would entitle them to succeed even if their allegations against the lady were true. The present plaintiff is the person of the name of Jhandu, who admittedly, in the pedigree is one degree further off from Sukhram than Mir Singh, who is still alive. He raised the present action on precisely the same averments as Mir Singh and the others raised their action in 1904, that is to say, he averred that *Musammât* Imirti was not a real widow, but was, as he described it, a Bhatni widow with whom Sukhram had illicit connection and who lived with him as a kept woman. He therefore asked for possession of the property. It seems that after 1904, but before the institution of the present suit, *Musammât* Imirti made a conveyance of part of the lands to certain third parties. The Subordinate Judge gave judgment in the plaintiff's favour, disregarding the fact that in no supposition could the plaintiff ever be entitled to immediate possession for which he asked, owing to the fact that Mir Singh was still alive and was a degree nearer than the plaintiff.

The High Court set aside that judgment and dismissed the suit, holding that it was impossible for the plaintiff to get what he asked, because, in any event, Mir Singh, under the present circumstances, would cut him out.

An appeal has been taken to their Lordships' Board, and the learned counsel for the appellant really gave up at once any idea of insisting on the relief which the plaintiff asked for; and which he got from the Subordinate Judge, because he admitted that the widow being alive he could not possibly get possession. That of course is tantamount to an admission that she is a real widow and not, as put in the plaint a kept woman. But he has pressed their Lordships to turn the pleadings round and to give him a declaration that this conveyance by the widow to these third persons was bad as an absolute conveyance, and was only given as for the period of her own life.

Now it is the fact that a reversioner in India may have a declaration from a Court to the effect that a conveyance by the person presently in possession is only good for the life of that person and is not good as an absolute conveyance of the property against the

reversioners. But it is perfectly well settled that that declaration will only be given to persons who stand in a certain relationship. It was laid down by this Board in the case, which has been quoted, of *Rani Anund Kunwar v. Court of Wards* (1) "that the right to bring such a suit is limited, and, as a general rule, belongs to the presumptive reversionary heir." It is quite true that the Board indicated that, in certain cases, the nearest reversionary heir might have precluded himself in some way by his own act or conduct from suing as by collusive action with the widow and in that case a reversioner in a more remote degree might be allowed to prosecute the suit. The argument that was addressed to the Board was that this was such a case, because Mir Singh having brought the suit in 1904, and failed through producing a false pedigree, he never could sue again.

There are two reasons either of which is sufficient to prevent that argument prevailing. The first has already been indicated, namely, that the relief asked for here was possession of the property, and that the declaration now sought for can scarcely be spelt out of the pleadings at all. But there is another objection which is equally fatal, and it is this. In 1904, when Mir Singh brought his suit, this deed of conveyance by the widow was not in existence, and therefore it is impossible to say that Mir Singh has, by his conduct in raising an action in 1904, precluded himself from challenging by way of declaration the deed which at that time was not in existence.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal with costs.

T. S. N.

Appeal dismissed.

Solicitors for Appellants—Barfield & Barfield.

Solicitors for Respondents—E. Dalgado.

(1) [1880] 6 Cal. 764=8 I. A. 14=8 Ch. R. 381=4 Sar. 195=5 Jur. 161 (P. C.).

**** A. I. R. 1914 Privy Council.**
(FROM ALLAHABAD.)

6th February, 1914.

LORDS SHAW AND MOULTON, AND
MR. AMEER ALI.

Mt. Bakhtawar Begam—Defendant-Appellant

v.

Husaini Khanum and another—Plaintiffs-Respondents.

**** Limitation Act (Act XV of 1877), Sch. II, Art. 148—Mortgage by conditional sale—S. 58 of the Transfer of Property Act (Act IV of 1882)—Right to redeem ordinarily accrues when the time limited for payment expires.—Where the mortgage was liable to be liquidated before the time limited by the usufruct which on the plaintiff allegations took place more than 60 years before suit the suit was held to be barred.**

The plaintiff sued for redemption of a mortgage by conditional sale entered into on 6th January, 1830, and in the absence of mortgage-deed, the Collector's proceedings dated 18th September, 1830, were relied on for the clause as to repayment and the High Court summarised the same as "an agreement to the effect that the sale would be cancelled on payment of the amount of consideration in nine years." The suit was filed on 6th January, 1899.

Held: The expression was certainly ambiguous and may mean either that the mortgagors might redeem at any time *within nine years*, in which case the claim would be barred or that the debt should remain outstanding *for nine years certain* and thereafter the right to redeem accrued.

As the plaintiffs' case as set out in paras. 2 and 8 of the plaint was that the mortgagors were entitled to recover the property within nine years on liquidation of the debt with the usufruct of the property, and the whole debt was in fact satisfied before 4th September, 1838, the suit was barred under Section 148, Schedule II of the Limitation Act. [P. 38. C. 1]

DeGruyther and B. Dube—for Appellant.

E. Richards, Ross and O'Gorman—for Respondents.

Mr. Ameer Ali:—The suit which has given rise to these consolidated appeals from a decree and judgment of the High Court of Allahabad was instituted by the plaintiff-respondent in the Court of the Subordinate Judge of Cawnpore for the redemption of a mortgage executed so long ago as the 6th of January, 1830. The suit was brought on the 6th of January, 1899, and the only and vital question presented at the Bar for determination in this is whether the claim is barred by the Statute of Limitation (Indian Act XV of 1877).

The plaintiff Husaini Khanum alleges that on the 6th of January, 1830, her father, Aga Fateh Ali, in conjunction with another relative named Aman Ali, executed a mortgage by way of conditional sale in respect of 12 villages lying within the district of Cawnpore in favour of one Ata-ullah Khan, since deceased. The other plaintiffs are persons who have acquired title from Husaini Khanum. The principle defendant in the action was one Ali Hussain Khan, who was the representative of Ata-ullah. He died since the decision by the High Court in the appeal from the decree of the Subordinate Judge, and he is now represented by his widow, Bakhtawar Begam, the appellant. The remaining defendants are assignees of interests created by the original mortgagee or his representatives in the mortgaged premises.

The mortgage-deed is not forthcoming, but both the Courts in India have found that the contract between the parties to the transaction is, for all material purposes, substantially set forth in the proceeding of the Collector's Court, dated the 18th of September, 1830, on an application for mutation of names in the Revenue Register.

The contract of mortgage by conditional sale is a form of security recognized throughout India, and its incidents have been embodied in Section 58 of Act IV of 1882 (the Transfer of Property Act). The form it usually takes is for the mortgagor to execute a deed of sale in respect of the mortgaged property in favour of the mortgagee, who on his side executes an agreement covenanting that on the liquidation of the debt, according to the terms of the contract, the sale would be cancelled, and he would reconvey the property to the mortgagor. On the breach of the condition relating to repayment the contract executes itself, and the transaction becomes one of absolute sale.

The proceeding which contains the contract in this case is set out in full in the judgment of the High Court. The only material part to which their Lordships need refer is the clause relating to repayment, which runs as follows:—

"On being asked, Sital Parshad, attorney of Ata-ullah Khan, stated that his client had executed and made over to Mirza Aman Ali and Fateh Ali an agreement to the effect that the sale would be cancelled on payment of the amount of consi-

deration in nine years, and that, therefore, the sale was not an absolute but a conditional sale."

The period of limitation under the Indian Statute for suits for redemption or for recovery of possession of mortgaged property is sixty years from the date of the accrual of the right to redeem or to recover possession (Art. 148, Schedule II, Act XV of 1877). The Subordinate Judge was of opinion that limitation began to run from the date of the contract, and accordingly held that the suit was barred. The High Court of Allahabad on appeal have taken a different view. The learned Judges considered *inter alia* that the right to redeem in respect of the seven villages which were in the possession of the mortgagee's representatives accrued only on the expiration of the period of nine years for which the contract was made, but that as regards the five villages which had been transferred by the mortgagee to third parties the claim was barred. They accordingly decreed the plaintiff's claim in respect of seven villages and dismissed it with regard to the rest.

The defendants have appealed from the first part of the High Court decree, against which there is a cross-appeal on the part of the plaintiffs.

The first question to determine is whether the plaintiffs' right to redeem is affected by 60 years' limitation, for in that case her claim must fail *in toto*. The learned Judges dealing with this point give expression to their opinion in the following passage in their judgment:—

"If the meaning of this contemporaneous agreement was that the mortgagors might redeem at any time within the period of nine years, the plaintiffs' claim is barred by limitation. If, on the other hand, the intention of the parties was that the debt should remain outstanding for a period of nine years certain, then the right to redeem only accrued at the expiration of that period. Ordinarily, a mortgagor cannot before the time limited for payment to the mortgagee expires, take proceedings to redeem. The reason for this is, that it was the agreement of the parties that the mortgage should, during the intervening time, remain as security for the money advanced, and therefore it is not competent for either party to disturb that relation."

And they refer to a number of cases in support of their conclusion. Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the

parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of the mortgagor. In the present case, had the matter depended only on the construction of the contract as given in the proceeding of the Collector, much might be said in support of the High Court's conclusions. The expression that "the sale would be cancelled on payment of the consideration in nine years" is certainly ambiguous.

But here the plaintiffs' case is that the mortgagors were entitled to recover the property within the period of nine years on the liquidation of the debt with the usufruct of the property. In the second paragraph of the plaint the plaintiffs state as follows:—

"The terms of the mortgage as agreed were that the mortgagee should remain in possession of the said mortgaged villages . . . that the amount of profits, if any, which shall remain after paying the Government revenue, interest, and pay of the persons making the collections, would be owned by the mortgagors and applied in the payment of the principal, and that whenever the mortgage-money would be satisfied (out of the usufruct), or paid (by the mortgagors) before or after the stipulated time the mortgaged property should be redeemed."

And the fact is emphasized in paragraph 8, which is in these terms:—

"The whole amount of the principal mortgage-money with interest mentioned in the mortgage deed was paid up at the end of the year 1245 *Fasli* according to the account which is annexed to this plaint and forms part of it. No portion of the mortgage-money, interest or any other demand is now due: on the other hand, there is a surplus amount due to the plaintiffs."

In their Lordships' judgment this is not a case of a wrong construction of a clause or condition in the contract. It is a distinct allegation of fact on which the right to recover possession is founded. But the matter does not rest there. The plaintiffs produced with the plaint a statement of accounts in respect of the 12 villages based on the settlement records to show the amounts realized by the mortgagee from 1830 to 1897. In this document it is clearly stated that the whole debt was satisfied in 1245 *Fasli* (4th September, 1837—4th September, 1838). From that time the balance of the realizations by the mortgagee after deduction of the legitimate outgoings is treated by the plaintiffs as sums retained by him without any right.

If the fact be, as the plaintiffs allege, that the mortgage-debt became satisfied under the contract in 1838, the right to recover possession accrued then, and the suit is clearly barred.

Their Lordships are, therefore, of opinion that the decree of the High Court partly decreeing the plaintiffs' claim should be set aside, and the suit dismissed, which will involve the dismissal also of the cross-appeal.

With regard to the costs, their Lordships think that Jamna Narain, who represents the original assignee of the five villages in respect of which the plaintiffs' suit has been dismissed by both the Courts in India, is entitled to the costs decreed in the Court of the Subordinate Judge and in the High Court, and to the costs of these appeals to His Majesty in Council. As regards the other parties, their Lordships think that the plaintiffs should bear the costs decreed against them in the First Court, but that each of the parties should bear their respective costs of these appeals and of the appeals to the High Court, including the costs incurred in the proceedings on remand.

And their Lordships will humbly advise His Majesty accordingly.

T. A. *Appeal allowed.*

Cross-appeal dismissed.

Solicitors for Appellant—T. L. Wilson and Co.

Solicitors for Respondents—(1) T. C. Summerhays and Son and (2) Ranken Ford and Chester.

A. I. R. 1914 Privy Council.

(FROM ALLAHABAD)

6th February, 1914.

LORDS SHAW AND MOULTON AND
MR. AMEER ALI.

Lala Brij Lal—Defendant-Appellant

v.

Mt. Inda Kunwar and others—Plaintiffs-Respondents.

(a) *Hindu Law—Reversioner—Suit to set aside widow's alienation—Onus of Proof of Necessity is on the purchaser which is not discharged by mere recitals in a deed without evidence ali unde.*

The onus of supporting a sale from a Hindu Widow is on the purchaser who should adduce evidence to prove such legal necessity as would bind the husband's estate and not rely simply on recitals in the schedule attached to the sale-deed.

Recitals in mortgage or deeds of sale with regard to existence of necessity for the alienation are not by themselves evidence of the fact and there must be evidence *ali unde* to substantiate the allegation. [P. 40, C. 1]

(b) *Privy Council—Interference in a finding of fact when the lower Courts differ in their opinion of the credibility of witnesses.*

In view of the divergence of opinion between the two Courts in India with respect to the credibility of plaintiff's witnesses, their Lordships closely examined the evidence and corroborative circumstances therein and interfered on a finding of fact. [P. 40, C. 2]

E. Richards and B. Dube—for Appellant.

DeGruyther and J. M. Parikh—for Respondents.

Mr. Ameer Ali :—The suits which have given rise to this consolidated appeal from three decrees of the High Court at Allahabad relate to a property called *Mouza Khilchipur* lying in the district of Rae Bareilly in the United Provinces of India.

The *Mouza* is now in the possession of the defendant-appellant under a usufructuary mortgage executed in 1871, in favour of his ancestor Madho Ram by two Hindu ladies, Rukmin and Nimma, and one Dal Chand. Other titles were created subsequently in favour of Madho Ram or his son Darbari Lal, to some of which reference will be made in the course of this judgment. But the plaintiffs' claim to possession depends principally on their right to redeem the mortgage of 1871.

Mouza Khilchipur belonged originally to one Kundan Lal. He died many years ago, leaving two sons Mihin Lal and Sham Lal, who, it is not disputed, were joint in food and estate. Mihin Lal died in 1853, and Sham Lal in 1859, leaving his widow Nimma and a nephew named Lila Dhar, Mihin Lal's son. On Sham Lal's death, the whole property devolved on Lila Dhar. Lila Dhar died in 1861, when Rukmin, his widow, became the owner, taking a widow's estate under Hindu law. But although Rukmin as the widow of the last full owner was entitled to the entire property, it would appear that Sham Lal's widow claimed, or was acknowledged to possess, an equal interest with Rukmin. In 1862, the two widows jointly sold a half or 10 *biswas* share of the village to Dal Chand, who is said to have been Rukmin's manager. In 1871, the three, Dal Chand, Rukmin, and Nimma executed the usufructuary

mortgage referred to above for a period of 12 years in respect of the entire *Mouza* represented as 20 *biswas*, in favour of Madho Ram, the conditions being that at the end of the term the debt would become satisfied and the mortgagors would recover the property without payment of the "principal mortgage-money" or interest. Dal Chand died, it is said, in 1873, and in 1874 his widow, Bhauna, sold the equity of redemption in respect of 8 *biswas* out of the 10 *biswas* he had acquired from Rukmin and Nimma to the son of Madho Ram, Darbari Lal, and his widow, Chando, one of the defendants in the present suits. The equity of redemption in respect of the remaining 2 *biswas* was sold in execution of a decree against Bhauna, and passed ultimately into the hands of the appellant.

It is unnecessary for the determination of this appeal to refer to the subsequent transactions by which Madho Ram's son acquired the equity of redemption in respect of the 10 *biswas* that had remained in the hands of Rukmin and Nimma after the sale of the moiety to Dal Chand.

The Brahman plaintiffs claim to be the reversioners of both Lila Dhar and Dal Chand. They allege that Bhauna, Dal Chand's widow, died in 1905, Nimma in 1906, and Rukmin a few years ago, and that upon their respective deaths whatever rights they had purported to create in favour of Madho Ram came to an end, and they are entitled to possession of the entire property. They have transferred a moiety of the *Mouza* with all the appurtenant rights to Inda Kunwar, who brings one suit in respect of the share purchased by her, whilst the Brahman plaintiffs have sued separately for the other share claimed by them.

With regard to the 10 *biswas* Dal Chand had purchased from Rukmin and Nimma, they allege that the sale of the equity of redemption in respect of 8 *biswas* by Bhauna was without legal necessity and that the execution sale of the 2 *biswas* was in respect of a personal decree against her, and that, consequently, neither transaction is binding against them.

The contesting defendants, the representatives of Madho Ram, denied that the Brahman plaintiffs were the reversioners of either Lila Dhar or Dal Chand; that their claim was barred by the Statute of

limitation, as Rukmin, the widow of the last full owner, died more than 12 years before suit, and that, even if the Brahman plaintiffs were the reversioners of Lila Dhar or Dal Chand, the transactions impugned by them were for legal necessity and consequently binding against them. The two suits were tried together, and although in consequence of the decree of the Subordinate Judge there were three separate appeals to the High Court, they were heard together; and subsequently on an application for leave to Appeal to His Majesty in Council, all three Appeals were consolidated. The case has thus come before their Lordships as a single consolidated Appeal. Their Lordships propose, therefore, in order to avoid confusion, to deal with the two suits as one consolidated action from the outset. The Trial Judge was of opinion that the evidence produced to establish the relationship of the Brahman plaintiffs to Lila Dhar was wholly untrustworthy. He, therefore, did not consider it necessary to enter upon an inquiry as to the time of Rukmin's death.

He held, however, that the Brahman plaintiffs (save Lachman) were the reversioners of Dal Chand, being his brother's sons; that the sale of the equity of redemption by Bhauna in respect of 8 *biswas* was for legal necessity, but that there was no proof that the sale by auction of the 2 *biswas* in execution of the decree against her was "in satisfaction of a debt contracted by her for legal necessity." He accordingly made a decree in Inda Kunwar's suit for the redemption of the mortgage of 1871 in respect of 2 *biswas*, and dismissed the rest of her claim as well as the claim of the Brahman plaintiffs in their suit.

From these decrees there were, as already observed, three Appeals to the High Court, one by the defendants in respect of the 2 *biswas*, and the two others by the two sets of plaintiffs, namely, Inda and the Brahmans respectively.

As regards the relationship of the Brahman plaintiffs to Lila Dhar, the learned Judges of the High Court have come to a diametrically opposite conclusion to the Trial Judge. They hold that it is satisfactorily established that they are the descendants of one Bhauna, *alias* Mulo, a daughter of Kundan Lal, and therefore related as *bandhus* to Lila Dhar, Ruk-

min's husband. They have further held that the sale by Rukmin and Nimma in 1862 to Dal Chand, the mortgage of 1871 by these three to Madho Ram, and the sale of the equity of redemption by Bhauna, Dal Chand's widow in respect of 8 *biswas*, were without legal necessity. They have also held that Rukmin was alive within 12 years from date of suit. They accordingly reversed the decree of the Trial Judge by which he had dismissed the plaintiffs' claim in respect of 18 *biswas*, and, affirming his order in respect of the 2 *biswas*, made a decree in favour of the plaintiffs in both suits.

In the present appeal the defendant Brij Lal, the grandson of Madho Ram, challenges all the conclusions of the High Court. The case as presented at their Lordships' Bar is divisible into two parts, one relating to the reversionary right to Dal Chand's estate, the other to Lila Dhar's. It is not disputed now that the Brahman plaintiffs, including Lachman, are the sons of Dal Chand's brothers, and are, therefore, entitled to his estate on the death in 1905 of his widow Bhauna. The only question for determination on this part of the case is whether the sale by Bhauna of the equity of redemption in respect of the 8 *biswas* was for legal necessity. The *onus* of supporting a sale from a Hindu widow is undoubtedly on the purchaser. In the present case the appellant has adduced no evidence to prove legal necessity as would bind the husband's estate. He has relied simply on the recitals in the schedule attached to the sale-deed. Recitals in mortgages or deeds of sale with regard to the existence of necessity for the alienation have never been treated as evidence by themselves of the fact. And it has been repeatedly pointed out by this Board that to substantiate the allegation, there must be some evidence *aliunde*.

In these circumstances, their Lordships are of opinion that the conclusion of the High Court with regard to the sale by Bhauna of the equity of redemption in respect of the 8 *biswas* is well founded.

Respecting the other 2 *biswas* which belonged to Dal Chand, there is a concurrent finding of fact by the two Courts that the decretal debt in execution of which it was sold was not for legal necessity. In the result, therefore, as regards the share purchased

by Dal Chand from Rukmin and Nimma in 1862, and which he jointly with them mortgaged in 1871 to Madho Ram, the Brahman plaintiffs, as reversioners of Dal Chand, are entitled to the same.

The position respecting the other 10 *biswas* seems to their Lordships quite different. The right of the plaintiffs to that share rests on the allegations that they are the grandsons of one Bhauna *alias* Mulo, who was a daughter of Kundanlal and the sister of Sham Lal and Mihin Lal. There is no documentary evidence in support of the statement that the wife of Hulas Rai, the grandfather of the plaintiffs, was a daughter of Kundan Lal. It was natural to expect that in 1862, when Rukmin and Nimma sold a moiety of the property to Dal Chand, the uncle of the plaintiffs, on which occasion the relationship of Lila Dhar, Rukmin's husband, was stated with some particularity, a reference should be made to the vendee's connection with the family. Other documents of a similar nature are equally silent. As observed already, the plaintiffs' allegation rests entirely on oral testimony. Having regard to the divergence of opinion between the two Courts in India with respect to the credibility of the plaintiffs' witnesses, their Lordships have closely examined the evidence, and they cannot help considering it to be of a very dubious character. The witnesses had to prove only one link in the chain of relationship, the discrepancies therefore, in their statements on material points, which have been somewhat lightly passed over by the High Court, seriously affect, in their Lordships' opinion, the value of their testimony. Their Lordships agree with the Trial Judge in considering the evidence as to Mulo being a sister of Sham Lal and Mihin Lal as worthless. In this view of the case, it is hardly necessary to determine whether Rukmin was alive or not within twelve years from date of suit. Admittedly she left her home many years ago. The plaintiffs allege she went on a pilgrimage, and was last heard of eight or nine years before the action. The defendant, on the other hand, says she had to leave her home a considerable time before, owing to having been outcasted for unchastity. Most of the witnesses who speak to her being recently alive state they obtained their information from Het Ram, one of the

plaintiffs, who has not thought fit to enter the witness-box. On the other hand, there are some corroborative circumstances which incline their Lordships to believe that Rukmin left the village in consequence of her lapse, and died many years ago in a distant relative's home.

On the whole, it appears to their Lordships that the plaintiffs have failed to establish their right to recover possession of the remaining 10 *biswas*, as reversioners to Rukmin's husband. The decree of the High Court in the suit of Inda Kunwar omits, however, from consideration the covenant in the deed of mortgage which provides that at the time of redemption the mortgagors:—

"Shall be liable for the amount of arrears and the amount of *takavi* advances and the amount advanced on account of seed which may be due to the mortgagee by the tenants of the village according to the entries in the *patwari's* papers."

Their Lordships are of opinion that the decrees of the Courts in India should be discharged, that the claim of the Brahman plaintiffs in their suit should be dismissed, and in the suit of Inda Kunwar who has acquired the 10 *biswas*, which alone the Brahman plaintiffs had a right to sell, there should be a declaration that she is entitled to recover possession of the same from the defendant-appellant, with mesne profits as provided by law, less any sum that may be found due to the mortgagee defendant upon the taking of proper accounts on the basis of the above-recited covenant within a time to be specified by the High Court.

And their Lordships will humbly advise His Majesty accordingly.

Considering the result, they think the ends of justice will be served by making the parties bear their respective costs in the appeal to the High Court and to this Board.

T. A. R.

Appeal allowed.

Solicitors for Appellant—Barrow, Rogers & Neville.

Solicitor for First Respondent—E. Dalgado.

A. I. R. 1914 Privy Council. (FROM MADRAS)

25th May, 1914.

LORDS HALDANE, MOULTON AND
PARKER OF WADDINGTON, SIR
JOHN EDGE AND MR. AMEER ALI.

Mrs. Annie Besant—Defendant-Appellant

v.

G. Narayaniah and another—Plaintiffs-Respondents.

Privy Council Appeal No. 23 of 1914.

(a) *Hindu law—Guardianship—Fathers' rights same as in English law, viz., a Trust which cannot be delegated though custody and education of minors may be entrusted to another—Such entrustment is revocable—But the Court having jurisdiction over minors will consider what is for the welfare of the minor and if need be prevent revocation.*

In Hindu law as in the law of England, the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust, and he cannot therefore during his life-time substitute another person to be guardian in his place. He may, in the exercise of his discretion as guardian, entrust the custody and education of his children to another but the authority he thus confers is essentially a revocable authority and if the welfare of his children require it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. If however, the authority has been acted upon in such a way as, in the opinion of the Court exercising the jurisdiction of the Crown over infants, to create associations or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint, such Court will interfere to prevent its revocation. *Lyons v. Blenkin* (1821) Jac. Rep. 245 Referred to. [P. 42, C. 2.]

(b) *Guardian and Wards Act, S. 9—District Court has no jurisdiction over infants not resident in the district.*

The jurisdiction of District Court is under Section 9 of the Guardian and Wards Act confined to infants ordinarily resident in the district and cannot extend to infants who had months previously left India with a view to being educated in England and going to the University of Oxford. [P. 43, C. 2.]

(c) *Guardian and Wards Act—Procedure in proceedings in District Court, relating to Guardianship—A suit inter partes is not the proper form, although proceedings are subsequently transferred to High Court, under Letters Patent, Clause 13.*

A suit *inter partes* is not the form of procedure prescribed by the Act for proceedings in a District Court touching the Guardianship of infants and the fact that it is subsequently transferred to the High Court under Clause 13 of the Letters Patent, 1865 does not confer more powers

than those which, but for the transfer, might have been exercised by the District Court.

[P. 43, C. 2.]

(d) *Specific Relief Act, S. 55—Mandatory order on defendant exposing him to proceedings on writ of habeas corpus in England cannot be made—Practice, Conflict of Laws*

The relief asked for was a mandatory order directing the defendant to take possession of certain infants in England, bring them to India and hand them over to their father (plaintiff). Considering the age of the infants, any attempt at compliance of the order would if the infants had refused to return to India, exposed the defendant to proceedings in England on a writ of *habeas corpus*.

Held, that no Court ought to make an order which might lead to such consequences.

The most which a Court in India could do was to order the defendant to concur with the plaintiff as the infants' guardian in taking proceedings in England to re-gain the custody and control of his sons.

[P. 43, C. 2.]

(e) *Guardian and Wards Act, S. 19—Guardian can be declared only if minor's interests require it—Guardian cannot be appointed during father's life-time unless he is unfit to be guardian.*

Whatever may be the jurisdiction of the High Court to declare infants to be Wards of Court, an order declaring a guardian can only be made if their interests require it. On such an issue the necessity of the infants being properly represented before the Court, and of ascertaining what they themselves desire can hardly be overlooked. And further, no order declaring a guardian can by reason of Section 19, of the Guardian and Wards Act, 1890, be made during the life-time of the father unless in the opinion of the Court he is unfit to be their guardian.

[P. 44, C. 1.]

Younger E. Richards and Roger W. Turnbull—for Appellant.

K. Brown—for Respondents.

Lord Parker :—This is an appeal from an order made by the High Court of Madras in its Appellate jurisdiction on the 29th October, 1913, confirming, with a variation as to costs, a decree of Mr. Justice Bakewell in a suit in which G. Narayaniah (the present respondent) was plaintiff, and Annie Besant (the present appellant) was defendant. The decree declared that J. Krishnamurti and J. Nityananda, the sons of the plaintiff, were wards of Court and that the plaintiff was guardian of their persons, and ordered the defendant to hand over the custody of the wards to the plaintiff as such guardian.

The facts which gave rise to the action were as follows :—The plaintiff is a Hindu residing at Madras. He is a Brahmin, but is not well off, having an income of some £160 per annum only. He was for many years a member of a society called the Theosophical Society, of which the defendant was president and was well

acquainted with her. He had two sons, J. Krishnamurti and J. Nityananda, born respectively on the 11th May, 1895 and 30th May, 1898. Early in 1910 the defendant offered to take charge of these sons and defray the expenses of their maintenance and education in England and at the University of Oxford. The plaintiff thought it desirable to take advantage of the opportunity thus afforded of giving his sons a western education, notwithstanding it would entail a loss of caste. He accordingly accepted the defendant's offer, and by a letter to the defendant, dated the 6th March, 1910, affected to appoint the defendant to be guardian of their persons and authorised her to act as such from that time forward.

In their Lordships' opinion the principle on which the legal effect of such a letter falls to be determined do not admit of dispute.

There is no difference in this respect between English and Hindu Law. As in this country, so among the Hindus, the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust, and he cannot therefore during his life-time substitute another person to be guardian in his place. He may, it is true, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children require it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. If however, the authority has been acted upon in such a way as, in the opinion of the Court exercising the jurisdiction of the Crown over infants, to create associations or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint, such Court will interfere to prevent its revocation : *Lyons v. Blenkin* (1).

Shortly after the respondent accepted her offer the appellant took charge of the boys and they have since been in her custody and she has defrayed the expense of their maintenance and education. In February, 1912, they left India in her company, and after staying with her for

(1) [1821] Jac. Rep. 245.

sometime in Sicily and Italy finally accompanied her to England, where she left them under the charge of Mrs. Jacob Bright, having made arrangements for their having a course of tuition such as would enable them to enter the University of Oxford.

Though the respondent's confidence in the appellant appears to have been shaken sometime previously for reasons to which it is unnecessary to refer, he assented to, or at any rate acquiesced in, the departure of his sons in her company for Europe. Nevertheless on the 11th July, 1912, he wrote the appellant a letter cancelling his previous letter of the 6th March, 1910, demanding that his sons should be restored to his custody and threatening proceedings if such were not complied with. The appellant who had returned to India refused to comply with such demand, and the respondent thereupon commenced a suit in the District Court of Chingleput, in the Madras Presidency, asking to have it declared, that he was entitled to the guardianship and custody of his sons, and that the appellant was not entitled to, or in any case was unfit to be in charge and guardianship of such sons, and for an order on the appellant to hand over such sons to the respondent or such other person as to the Court might seem meet.

In their Lordships' opinion this suit was entirely misconceived. It was not, and indeed could not be disputed that the plaintiff remained the guardian of his children notwithstanding that he had affected to substitute the defendant as guardian in his place. The real question was whether he was still entitled to exercise the functions of guardian, and resume the custody of his sons and alter the scheme which had been formulated for their education. Again, it was not and could not be disputed that the letter of the 6th March, 1910 was in the nature of a revocable authority. The real question was whether in the events which had happened the plaintiff was at liberty to revoke it. Both questions fell to be determined having regard to the interests and welfare of the infants bearing in mind, of course, their parentage and religion, and could only be decided by a Court exercising the jurisdiction of the Crown over infants, and in their presence. The District Court in which the suit was instituted had no jurisdiction over the

infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890. By the ninth section of that Act the jurisdiction of the Court is confined to infants ordinarily resident in the district. It is in their Lordships' opinion impossible to hold that infants who had months previously left India with a view to being educated in England and going to the University of Oxford were ordinarily resident in the district of Chingleput. Further a suit *inter partes* is not the form of procedure prescribed by the Act for proceedings in a District Court touching the guardianship of infants. It is true that the suit was subsequently transferred to the High Court under Clause 13 of the Letters Patent, 1865, but the powers of the High Court in dealing with suits so transferred would seem to be confined to powers which but for the transfer might have been exercised by the District Court.

Again, the relief asked for was a mandatory order directing the defendant to take possession of the persons of the infants in England, bring them to India, and hand them over to their father. Considering the age of the infants any attempt on the part of the defendant to comply with this order, would, if the infants had refused to return to India, have been contrary to the law of this country, and would have at once exposed the defendant to proceedings in this country on writ of *habeas corpus*. No Court ought to make an order which might lead to these consequences. The most which a Court of competent jurisdiction in India could do under circumstances such as existed in the present case was to order the defendant to concur with the plaintiff as the infants' guardian in taking proceedings in this country to regain the custody and control of his sons.

The difficulties and anomalies of the procedure adopted by the plaintiff are well illustrated by the history of the proceedings. After the transfer to the High Court, issues were settled in the ordinary manner. There was no issue as to whether it was or was not desirable in the interests of the infants, that they should give up all idea of a western university education, and return to India. It was urged that the High Court did in fact consider their interests. If it did so, it must have been upon evidence admitted as relevant on other issues, and it is by

no means apparent that, had a proper issue on the point been directed, further evidence would not have been available. At any rate on such an issue, the necessity of the infants being properly represented before the Court, and of ascertaining what they themselves desired could hardly have been overlooked.

At the trial of the action some difficulty appears to have been felt by reason of the facts (1) that the suit was not such as to make the infants wards of Court, and (2) that the elder infant would within a very short time attain his majority according to Hindu Law. The trial Judge sought to overcome those difficulties (1) by declaring the infants wards of Court, and (2) by taking advantage of Section 3 of the Indian Majority Act, 1875, as amended by Section 52 of the Guardians and Wards Act, 1890, and declaring under Section 7 of the latter Act, that the plaintiff was their guardian so as to prolong their minorities until they attained respectively the age of 21 years. It was hardly contended that any such order was competent to the District Court in the suit in question. It is alleged, however, that when once the suit had been transferred to the High Court, the High Court had a general jurisdiction over infants which they could exercise at pleasure, and that the directions in question were properly given by virtue of such general jurisdiction. It is to be observed, however, that whatever may have been the jurisdiction of the High Court to declare the infants to be wards of Court, an order declaring a guardian could only be made if their interests required it, and, as appears above, they were not before the Court, nor were their interests adequately considered. And further, no order declaring a guardian could by reason of the 19th section of the Guardians and Wards Act, 1890, be made during the respondent's life unless in the opinion of the Court he was unfit to be their guardian, which was clearly not the case.

Since the appeal has been presented the infants have obtained the leave of the Board to intervene therein and be heard by Counsel. Counsel on their behalf have appeared before their Lordships' Board and stated that the infants do not desire to return to India or abandon their chance of obtaining an university education in this country. The order of the

High Court directing the defendant to take them back to India cannot be lawfully carried out without their consent or without an order from the Court exercising the jurisdiction of the Crown over infants in this country. It is and always was open to the respondent to apply to His Majesty's High Court of Justice in England for that purpose. If he does so the interests of the infants will be considered, and care will be taken to ascertain their own wishes on all material points. Their Lordships do not consider it desirable to express any opinion of their own on questions with which only the High Court in England can deal satisfactorily. It is enough to say that the order made by the Trial Judge in India as varied by the High Court in its Appellate jurisdiction cannot stand, and their Lordships will humbly advise His Majesty that the same ought to be discharged, and the suit dismissed with costs both here and in the Courts below, but without prejudice to any application the respondent may think fit to make to the High Court in England touching the guardianship, custody and maintenance of his children.

T. A. R.

Appeal allowed.

Solicitors for Appellant—Lee and Pembertons.

Solicitors for Respondent No. 1—Douglas Grant.

* A. I. R. 1914 Privy Council. (FROM ALLAHABAD.)

24th April, 1914.

LORDS MOULTON AND PARKER OF
WADDINGTON, SIR JOHN EDGE AND MR.
AMEER ALI.

Mt. Hiran Bibi and others—Appellants
v.

Mt. Sohan Bibi—Respondent.

**Compromise—Compromise is not an alienation by limited owner but a family settlement.*
A compromise is in no sense of the word an alienation by a limited owner of family property but a family settlement by which each party takes a share in independent right. 33 All. 356 (P. C.) followed. [P. 45, C. 1.]

DeGruyther and *B. Dube*—for Appellants.

Respondents—*Ex parte*.

Lord Moulton:—In this case their Lordships are of opinion that the facts bring it within the decision of *Lala Kunni*

Lal v. Kunwar Gobind Krishna Narain (1) in other words, that the compromise in question is in no sense of the word an alienation by a limited owner of the family property, but a family settlement in which each party takes a share of the family property by virtue of the independent title which is, to that extent, and by way of compromise, admitted by the other parties.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court should be set aside, that the decree of the District Judge should be restored, and that the appellants should have their costs of this appeal and the costs of the suit in both Courts.

T. A. *Appeal allowed.*

Solicitors for Appellants:—Barrow, Rogers and Nevill.

(1) [1911] 33 All. 356=10 I. C. 477=38 I. A. 87 (P. C.).

****A.I.R. 1914 Privy Council.** (FROM CALCUTTA).

11th May, 1914.

LORDS DUNEDIN AND MOULTON, SIR
JOHN EDGE AND MR. AMEER ALI.

P. C. E. Paul and another—Appellants
v.

W. Robson and others—Respondents.

Privy Council Appeal No. 17 of 1913.

**** Easements Act, S. 15—Right to light—Infringement of—Is actionable only when such infringement amounts to a nuisance.**

The owner of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is, what is required for the ordinary purposes of inhabitancy or business of the tenant according to the ordinary notions of mankind. The single question in these cases is, whether the obstruction complained of is a nuisance. *Coles v. Home and Colonial Stores* (1904) A. C. 179 and *Jolly v. Kine* (1907) A. C. 1 Referred.

[P. 46, C. 1.]

Upjohn, Hudson, and W. E. Vernon—
for Appellants.

DeGruyther and A. M. Dunne—for
Respondents.

Lord Moulton:—The action in which the present appeal is brought is an action in which the appellants sued the respondents for infringement of certain rights of light possessed by them in connection with premises known as 7, Esplanade East, Calcutta, of which they owned the

freehold. The respondents had erected a building known as 8, Esplanade East, Calcutta, lying to the east of the appellants' premises and so situated that the western walls of the respondents' buildings were parallel to and at a distance of 17 feet from the eastern wall of the appellants' building. The ground on which the respondents' building was erected had for more than 20 years previously been occupied by much lower buildings, and it is conceded that the appellants had acquired rights of light thereby for the windows on the east side of their premises. The new buildings of the respondents greatly exceed in height the former buildings upon the site and decreased the amount of light coming to the eastern windows of the appellants, and it is in respect of this interference with the access of light to their windows that the appellants brought the action.

The action came on for trial with witnesses before the Hon. Mr. Justice Stephen, sitting as a Judge of the High Court of Judicature at Fort William in Bengal, in its ordinary civil jurisdiction, and on the 29th day of March, 1911 he gave judgment dismissing the action. An appeal was brought from that judgment to the High Court of Judicature at Fort William in Bengal in its appellate jurisdiction, and on the 1st day of August, 1911, judgment was delivered by that Court dismissing the appeal. It is from this judgment that the present appeal is brought.

Both in the Court of first instance and in the Court of Appeal the facts of the case are dealt with in detail, and clear findings are given on all relevant points of fact. Their Lordships can find no material difference between the views taken by the two Courts on these points of fact, though the expressions used may not be in all cases identical. Their Lordships therefore would feel justified in holding, if it were necessary, that this is a case of concurrent findings of fact. But in truth the grounds of appeal do not relate to these findings of fact, but to the question whether the Courts below have taken the proper view of the legal rights of the appellants, and whether accordingly, the test which they applied as to whether those rights had been infringed was the correct one. This is a pure question of law, and it was admitted by counsel for

the appellants that it practically turns upon the interpretation to be given to the well-known decision of the House of Lords in the case of *Colls v. Home and Colonial Stores* (1), when considered in connection with the later decision of the House of Lords in *Jolly v. Kine* (2).

Their Lordships do not consider that it is either necessary or profitable to go into the history of the divergent views in respect of the nature and extent of rights of light acquired by prescription that prevailed in the Courts prior to the decision in *Colls's Case* (1). It suffices to say that one stream of authorities gave countenance to the view that by the enjoyment of light for a period of 20 years, there could be acquired an indefeasible right to the enjoyment of a like amount of light in the future. The conflicting stream of authorities countenanced the view that nothing constituted an infringement of rights of light which did not amount to an actionable nuisance, so that the amplitude of previous enjoyment was no measure of the rights acquired thereby. This conflict of views was fully recognised by the noble Lords who took part in the decision of *Colls's Case* (1), and there can be no doubt that it was their intention to decide between them, and to lay down the law in such a manner as to prevent uncertainty in the future.

Mr. Justice Stephen takes, as expressing the law laid down by this decision, the following quotation from the opinion of Lord Davey in that case:—

"The owner . . . of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind . . . The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon—Whether the obstruction complained of is a nuisance?"

And the Court of Appeal, although they do not so directly base their judgment on the above passage in Lord Davey's opinion, appear to their Lordships to have substantially taken the same test. But in their Lordships' opinion it is not necessary to examine minutely the verbal differences between the expressions used in the Court

of Appeal and by the Judge of first instance. They accept in full the findings on fact of the Judge of first instance, and they are of opinion that he has consistently applied to them the legal test above formulated. The only question therefore is whether it accurately formulates the law on the subject.

It is evident on reading the opinion of Lord Davey that he intended the passage to be a precise formulation of the rights of a dominant tenement in respect of ancient lights, and his opinion was formally accepted by Lord Robertson who also took part in the decision. The opinion of the Lord Chancellor in the case is equally clear on the essential points that the easement acquired by ancient lights is not measured by the amount of light enjoyed during the period of prescription, and that there is no infringement unless that which is done amounts to a nuisance. It has been suggested that a different view is to be found in the opinion of Lord Macnaghten and Lord Lindley, but although there are passages in these opinions which might if they stood alone indicate that those noble Lords considered that to some extent the amount of light enjoyed in the past might influence the rights acquired for the future, there is no reason to think there was any intention on the part of those noble Lords to differ from the conclusions of their colleagues. It must be taken therefore that the House of Lords adopted the formulation of the law given by Lord Davey as above mentioned.

But if any doubt remained on the point it is in their Lordships' opinion set at rest by a consideration of the subsequent decision of the House of Lords in the case of *Jolly v. Kine* (2). In that case Mr. Justice Kekewich had found as a fact that the obstruction amounted to a nuisance, but in the course of his judgment said that the room affected was "still a well-lighted room." He gave judgment for the plaintiff. On appeal to the Court of Appeal there was a division of opinion among the judges. Romer, L. J., held that under the decision in *Colls's Case* (1) the finding that it was still a well-lighted room was fatal to the plaintiffs' claim. Vaughan Williams and Cozens Hardy, L. J.J., held to the contrary. On appeal to the House of Lords their Lordships were equally divided and accordingly the

(1) [1904] A.C. 179=53 W. R. 30=20 T. L. R. 475=73 L. J. Ch. 484=90 L. T. 687.

(2) [1907] A.C. 1=23 T. L. R. 1=51 S. J. 11=95 L. T. 656=76 L. J. Ch. 1.

appeal was dismissed. But this division of opinion was not due to any doubt as to the law to be applied. The Lord Chancellor gives his opinion on the law as laid down in *Colls's Case* (1) in the following words:—

"The right of the owner or occupier of a dominant tenement to light is based upon the principle stated by Lord Hardwicke in 1752 in *Fishmongers' Co. v. East India Co.* (3) that he is not to be molested by what would be equivalent to a nuisance. He does not obtain by his easement a right to all the light he has enjoyed. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitation or business according to the ordinary notions of mankind having regard to the locality and surroundings. That is the basis on which the decision of this House proceeded."

Lord James of Hereford concurred in the Judgment delivered by the Lord Chancellor.

These were the judgments of the two noble Lords who were in favour of dismissing the appeal. On the other hand, Lord Robertson was of opinion that the appeal should be allowed and in his opinion says:—

"I adhere, as I did in *Colls's Case* (1) to the definition given by Lord Davey in entire accordance with the judgments of the other noble and learned Lords. According to that definition the quantity of light to which right is acquired in 20 years is 'what is required for the ordinary purposes of inhabitation or business of the tenement according to the ordinary notions of mankind.'"

Lord Atkinson, who was the other member of the Court, was also in favour of allowing the appeal, and referring to the decision in *Colls's Case* (1) he says:—

"It would appear to me that that case established the principle that there must be an invasion of the legal right of the owner of the dominant tenement sufficient to amount to a nuisance in order to give him a right of action, and that as long as he receives through the windows of his dwelling-house, or in the case of a particular room in his dwelling-house, through the windows of that room, an amount of light which, to use the words of James, L. J., in *Kelk v. Pearson* (4) is 'sufficient' according to the ordinary notions of mankind for the comfortable use and enjoyment of his dwelling-house, or of the room in it, as the case may be, no nuisance has as regards him been created, and no legal wrong has been inflicted upon him."

And although he does not expressly repeat the well-known passage from Lord Davey's opinion in *Colls's Case* (1) he shows by the language which he uses

that he thoroughly agrees with it, and says that to him it appears to be of general application.

In the judgment of the House of Lords in *Jolly v. Kine* (2) there is therefore an authoritative exposition of the decision in *Colls's Case* (1), and it is established that the law as formulated by Lord Davey is the law laid down by that decision. It is somewhat remarkable therefore that counsel for the appellants should have sought to treat the decision in *Jolly v. Kine* (2) as throwing some doubt upon the interpretation of the decision in *Colls's Case* (1), operating, if such an expression could be used, to weaken it in the direction of directing that regard should be had to the extent of previous enjoyment of light. The only explanation of such a view is that the appeal was in the end dismissed, inasmuch as the House was equally divided. But this was in no way due to any difference of opinion as to the law, but to the fact that the Lord Chancellor felt himself entitled to disregard the finding that the room was "still a well lighted room" in the sense which those words would naturally convey and to hold them as meaning that it would have been considered to be well-lighted according to the standard of a crowded city. His Lordship was led to this conclusion by passages in the evidence and the context of Mr. Justice Kekewich's judgment. It was on this ground alone that he was in favour of dismissing the appeal, and therefore the actual result in that case has no bearing on its effect as an authoritative explanation of the law laid down in *Colls's Case* (1).

Their Lordships are therefore of opinion that the learned Judge at the trial took the proper test as to whether or not there had been an infringement of the rights of the appellants and that he applied it correctly to the facts of the case. They are therefore of opinion that his judgment was right and that the Court of Appeal was right in affirming it, and they will humbly advise His Majesty that the present appeal should be dismissed with costs.

T. S. N.

Appeal dismissed.

Solicitors for Appellants—Westbury, Preston, and Stavridi.

Solicitors for Respondents—Members of Mackintosh Burn and Co., Watkins and Hunter.

(3) [1752] 1 Dick., 163=21 Eng. Rep. 232.

(4) [1871] 6 Ch. 809=19 W. R. 665=24 L. T. 890.

**** A. I. R. 1914 Privy Council.**

(FROM NAGPUR.)

24th April, 1914.LORDS MOULTON AND PARKER OF
WADDINGTON, SIR JOHN EDGE AND
MR. AMEER ALI.*Perfect Pottery Co., Ltd.*—Appellants
v.*Ida L. Rose*—Respondent.

** * Contract—Offer by letter to the company was accepted by a minute of the Company wherein all the terms of the letter were not incorporated—The minute is the only contract between the parties and the letter is ineffective and cannot vary its terms.*

Rose the inventor of the "perfect tile," offered his patent and his services to the provisional directors of the "Perfect Pottery Co." which accepted the offer by a minute of 15th October, 1905. The company agreed to pay Rs. 30,000 for the patent, Rs. 10,000 in cash and Rs. 20,000 in shares with the proviso that the property therein should vest in Rose in the fifth year. By a letter to the Directors, Rose agreed that they had power to cancel and retain such shares in certain events including his death. Rose died before the end of the fourth year and the company refused to allot the shares to his widow.

Held, The only contract between Rose and the Company was contained in the minute of 15th October, 1905 and so far as it contains any express terms, those terms differ from the clause in the letter D, enabling the company to cancel and retain shares, which is therefore inoperative.

[P. 48, C. 1.]

Robert Finlay and Lowndes—for Appellants.

Shence and O'Gilvie—for Respondent.

Lord Parker :—In this case their Lordships are of opinion that the only contract between Mr. Rose and the Company was that contained in the minute of the 15th October, 1905. The question which their Lordships have to decide is how far this minute incorporates the terms of the document which has been referred to as D-1? It is to be observed that so far as it contains any express terms, those terms differ from those contained in D-1. The most, therefore, that can be argued, is that D-1 is incorporated, except so far as it is inconsistent with the express terms of the minute.

Now one of the express terms is, that there is a sale of the Patent for Rs. 30,000, to be paid partly in cash and partly in paid-up-shares, and in their Lordships' opinion, the clause contained in D-1, which enables the Company to retain and cancel these shares in certain

events is inconsistent with there being such a sale.

For these reasons their Lordships think that the decision of the Court below was correct. In their opinion the plaintiff is entitled, in the events which have happened, to have shares to the amount of Rs. 20,000 allotted as fully paid.

With regard to the suggestion which has been put forward that shares have already been allotted which are not fully paid their Lordships need not express any opinion. Their Lordships will humbly advise His Majesty to dismiss this appeal with costs.

Their Lordships think that there was no sufficient reason for depriving the respondent of her costs in the two Courts below. Therefore, the decree of the Court of the Judicial Commissioner will be varied to the extent of giving her these costs.

T. A.

Appeal dismissed.

Solicitors for Appellants—T. L. Wilson and Co.

Solicitors for Respondent—Bull and Bull.

A. I. R. 1914 Privy Council.

(FROM CALCUTTA)

16th July, 1914.LORDS MOULTON, SUMNER AND PARMOOR,
SIR JOHN EDGE AND MR. AMEER ALI.*Raja Srinath Roy and others*—Plaintiffs—
v.*Dinabandhu Sen and others*—Defds.

Privy Council Appeal No. 65 of 1912.

(a) Fishery—Jalkar—Grant by Government in a tidal navigable river—Evidence of the grant must be clear and conclusive—The grantee can follow the river whichever course it may take for the enjoyment of his right whether the shifting of channel is gradual and imperceptible or is the result of sudden and violent eruption—English Law—Not applicable in Bengal.

The Evidence of a Government grant of an exclusive fishery in navigable rivers ought to be conclusive and clear. (11 Cal. 434 followed). A grantee of a Jalkar (exclusive fishery) from the Government of Bengal can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the up-stream and down-stream limits of his grant whether the Government owns the soil subjacent to such waters or whether the soil is in a riparian proprietor as being the site of the river's recent encroachment; and whether the shifting of the channel is gradual and imperceptible or is the result of sudden and violent eruption.

In this respect the English Law is not similar to that prevailing in India. The rule which in England connects the subject's right to an exclusive fishery in tidal and navigable waters within the limits of the Crown's ownership of the subjacent soil is itself the result of conditions partly historical and geographical which have no counterpart in Lower Bengal. (Indian and English Case-Law discussed).

"Where the power of the government to grant several right of fishery arises from sovereignty and is not limited to the bounds of its proprietorship as it may exist from time to time.

[P. 54, Cols. 1 & 2 and P. 57, C. 1.]

(b) *Evidence Act, S. 65. sub-S. 3—Secondary evidence may be given to prove the contents of documents not to be found.*

In case of documents the originals of which cannot be had or are not available, resort must be had to secondary evidence of them, or to the inference of a legal origin to be drawn from long user. [P. 50, C. 2.]

DeGruyther and Dunne—for Applts.

G. R. Lowndes—for Respondents.

Lord Sumner:—In this action the plaintiffs claimed, as proprietors of a several fishery in certain tidal navigable waters in Eastern Bengal, a decree, for possession of an exclusive fishery in a portion of a river channel, of which the principal defendants own both the bed and the banks. They succeeded before the Additional Subordinate Judge of Faridpur and failed on appeal to the High Court at Calcutta. Hence this appeal to their Lordships' Board.

There is a section of the river system of the Lower Ganges, between Dacca on the left bank and Faridpur on the right, where the great stream divides and for many miles runs in two channels roughly parallel with one another. The general course is to south-east. The northern of the two channels is much the larger, but the southern, the smaller of the two, is itself wide. Both channels are tidal and navigable.

The streams in the Gangetic delta are capricious and powerful. In the course of ages the land itself has been deposited by the river, which always carries a prodigious quantity of mud in suspension. The river comes down in flood with resistless force, and throughout its various branches is constantly eroding its banks and building them up again. It crawls or races through a shifting network of streams. Sometimes its course changes by imperceptible degrees; sometimes a broad channel will shift or a new one open in a single night. Slowly or fast it raises

islands of a substantial height standing above high water level and many square miles in extent. Lands so thrown up are called "churs", and it is by churlands formed at some unknown though probably not remote date that the northern and southern channels in question are at present divided.

In the year 1897 a channel was broken through the defendants' churland in question. Though relatively small, even this stream was of considerable size; it is navigable for small craft, and is certainly within the ebb and flow of the tide. This new branch probably followed a line of depressions already existing, one end of which was actually an arm running up from the northern river. The plaintiffs claim the exclusive fishery in this new navigable channel as falling within the up-stream and down-stream limits of their several fishery, and allege that the defendants are trespassers when they fish in it. The defendants justify their claim to fish in a portion of this channel as part of the rights of owners of the subjacent soil and of persons claiming under them. That the plaintiffs are entitled to some fishery right in the river waters generally, not far distant from the site in question, never was much disputed, and was admitted by the respondents before their Lordships' Board, but they dispute its origin and its extent. They say that this branch is of origin so recent that no title by prescription or adverse possession arises as against themselves; that they are not affected by evidence of prescription against third parties; that even a several fishery, duly created in the main stream by the Government of India in right of the Crown, would not extend to this new branch, still less would rights acquired in the main stream by prescription against other riparian proprietors be exercisable in it; that the evidence neither establishes such bounds for the alleged exclusive fishery up-stream and down-stream as would bring this branch between them, nor shows that in fact any *jalkar* right was ever created by Government at all. In substance the Trial Judge found for an actual Government creation of the plaintiffs' right, as well as for the boundaries claimed by them. The High Court concluded against the plaintiffs on the question of the extent of their *jalkar* rights without determining their origin.

The evidence of the origin of the plaintiffs' rights is documentary, and does not depend on the credibility of witnesses. Chur Mukundia is the name of the plaintiffs' *pergunnah*. They produced among many other documents (i) an *ekjai hastbud* in respect of it for the year 1790, which showed that it then included a *Mahal jalkar*; (ii) a *hakikat chowhaddibandi* of the lands and jamas of that *pergunnah* for the year 1795, which showed that the name of the *jalkar mahal* was River Balabanta and Bid Baor with specified boundaries, of which the Kole Churi of Alipur alone can now be traced by name; (iii) *dowl habuliyats* of 1793 and 1799, specifying the amount of the *dowl-jumma* of the *jalkar*; and (iv) *issumnavisi mouzahwari* of 1821 mentioning the *jalkar* in the River Balabanta, as a *mouza* of *pergunnah* Chur Mukundia. They put in (v) a *robokari* of the Court of the Collector of Faridpur, dated 11th January, 1861, by which the Government recognised that this *jalkar* had been included as a *malal* in the zamindari *pergunnah* Chur Mukundia (formerly Touzi No. 110 in the Dacca Collectorate, and now No. 4,000 in that of Faridpur), since before the decennial settlement. It named the up-stream and down-stream limits, and stated that the Balabanta river, in which it was enjoyed, was the same as that known in 1861 as the Padma, that is the larger and more northerly of the two branches of the Ganges above described. The more southerly has been known for some fifty-years as the Bhubaneshwar.

Some evidence, not very distinct, was given at the trial, apparently for the purpose of showing that no grant from the Government was any longer to be found among the papers belonging to the plaintiffs' zamindari, but no point seems to have been made then or since that the proper searches had not been made. Although, on the other hand, when Government has created a separate estate of *jalkar* at the period in question, it is usual to find some entry of it in the decennial settlement papers yet no evidence was forthcoming to show that *jalkar* grants made prior to the decennial settlement or that settlements with zamindars made at the time of it must necessarily have taken the form of *pottahs* or some other muniments which should now be in the zamindar's possession, or be recorded

in the Government archives still in existence. In practice such original grants are but rarely forthcoming now, and resort must be had to secondary evidence of them, or to the inference of a legal origin to be drawn from long user (Garth, C.J., in *Hori Das Mal v. Mahomed Jaki* (1)). The Trial Judge was satisfied that the plaintiffs had proved a Government grant or settlement about the end of the eighteenth century. He was overruled by the High Court, not on the ground that no such grant was proved, but that it was not shown to have been a grant of a several fishery of wide extent. The High Court thought that in reality it was only appurtenant to the plaintiffs' actual *pergunnah* and was limited by its riverine bounds.

Their Lordships accept the rule laid down in the case of *Hori Das Mal v. Mahomed Jaki* (1) following the English rule in *Fitzwalter's case* (2) that the evidence of a Government grant of an exclusive fishery in navigable waters ought to be conclusive and clear, but they are of opinion that, in so far as such evidence can now be expected to be forthcoming as to particular grants more than a century old, the evidence in the present case was sufficient to show that the competent authority—the Government of India in right of the Crown—did actually grant to the plaintiffs' predecessors-in-title, or settle with them so as in effect to grant, a *jalkar* right of several fishery in certain of the waters of the portion of the Ganges system in question.

The next point is one of metes and bounds. This depended partly on the above-named documents, partly on the records of certain litigation with the neighbouring zamindars of *pergunnah* Bikrampur and persons holding under them in 1816 and 1843, put in as part of the history of the fishery and of the claims made to it, partly on the testimony of living *patnidars*, *ijaradars*, fishermen, and so on, and the local investigations of an *ameen* deputed by order of the Court. The *ameen's* reports and maps were accepted in both Courts, and by both parties on the present appeal. The plaintiffs' case depended on fixing by means of the above materials, supple-

(1) [1885] 11 Cal. 434 (F.B.).

(2) [1686] 3 Keble 242=1 Mod. 105.

mented by a series of maps from 1760 onwards, four points roughly forming a parallelogram within which their alleged *jalkar* rights lay, the western or up-stream boundary and the eastern or down-stream boundary in each case extending from points north of the northern or larger channel, the Padma, to points south of the southern or smaller channel, the Bhubaneshwar, and the *locus in quo* of the dispute falling between them. The defendants contended, that in so far as any certain points were proved at all, the materials relied upon only showed that the fishery did not extend into any part of the Padma, but was limited by the right or southern bank of the main stream and thus excluded it. They pointed out that the Faridpur Collectorate was bounded by the right bank of the Padma, the whole breadth of the main stream being in the Collectorate of Dacca, and they argued that the *robokari* of 1861, which was the strength of the plaintiffs' case, proved at most a recognition of a fishery right, which stopped short of those waters in which it was now essential to the plaintiffs to make good their claim.

A sufficient answer is made by the plaintiffs. They obtain early evidence of the actual position of the points forming their boundaries north of the main stream from proceedings in suits decided in their favour between themselves or their predecessors-in-title and the owners of the Bikrampur zamindari, who claimed some *jalkar* rights in the main Padma also, and by means of such proceedings in 1797, 1816, and 1843, by means of other similar proceedings in litigation with some of the present defendants in 1894, 1896, and 1897, and also by a long succession of *ijara kabuliyats* and *pottahs*, which they put in evidence, they prove *de facto* possession, as under their *jalkar* rights, of the whole fishery in both streams between their upper and their lower limits. It is an intricate task to trace the various spots mentioned from map to map, because of the periodic diluviation of trees and houses, though these are the least transient of the landmarks available. Matters are also complicated by variations in the names of the rivers, Bhubaneshwar, Krishnapur, Narina, Padma and Balabanta or Balbanta. The result, however, is sufficiently clear. Further, the decision recorded

in the *robokari* of 1861 was appealed to the Commissioner of the division at Dacca, who at that date exercised appellate jurisdiction in such matters over the Collectorate of Faridpur, and he affirmed the decision below. As this decision proceeded on the footing that the *jalkar* claimed extended over the waters of the Padma, and was a valid *jalkar* included in the permanent settlement, it may reasonably be inferred that the Commissioner of Dacca took note that the parties entitled to the *jalkar*, claimed rights within his collectorate, and finding nothing in the Dacca records to the contrary, affirmed the decision below for Dacca as well as for Faridpur.

The Trial Judge, following a long and considerable body of decisions in Bengal, held that, if the plaintiffs' rights in this stream or streams out of which the new branch opened were once established, they would extend to the waters of the new branch as soon as it was formed, a principle which is conveniently called "*the right to follow the river.*" It does not appear that this current of authority was challenged or doubted either before the Trial Judge or the High Court; certainly its authority was binding upon both. The defendants' case simply was that in fact neither the plaintiffs nor their predecessors-in-title could be shown ever to have enjoyed or to have been entitled to any *jalkar* right except that lying within the boundaries of their zamindari and appertaining thereto. The High Court appears to have arrived at a conclusion in favour of the defendants' argument mainly in consequence of the view taken of the true meaning of the judgment of 1816, and of the significance of the *Thakbast* map of 1862, and a marginal note upon it. It is not necessary to examine the language of the judgment of 1816 in detail, but their Lordships are unable to hold that it excluded the main or northern stream from the plaintiffs' fishery, either expressly or by implication. The language is obscure, but, as their Lordships read it, the plaintiffs' construction of it was right. The *Thak* map was pressed beyond its legitimate effect. It was concerned only with that portion of the fishery which fell within pergunnah Bikrampur, and was inconclusive."

The question of the effect of deltaic changes in a river's course upon the ex-

clusive right of fishing in it appears in the Indian decisions as long ago as the beginning of the last century. It was laid down in 1807 that if a river changes its bed the owner of *jalkar* rights in the old channel continues to enjoy them in the new one: *Ishurchand Rai v. Ramchand Mokhurji* (3). The converse case occurred in the following year. A land-owner sued the owner of *jalkar* rights in a tidal river for taking possession of a *jhil* formed on his land by the overflow of the river. The channel of the river had not altered, the *jhil* formed no part of it, and was only connected with it at the river's highest stage. Accordingly, it was held that the owner of the fishery, having no right over the plaintiffs' land, had no right to the fishery in waters thus formed upon his lands: *Gopeenath Roy v. Ramchunder Turk-lunkar* (4). This assumed some right of following the river and placed a particular limit upon it.

It will be observed so far that whatever may have been the basis for the right of *jalkar* in the river, the right of fishing in the *jhils* was treated as belonging to the owner of the subjacent soil, a right which was shortly after, in 1813, held to be severable from the ownership of the soil, so that the bare grant by the landowner of the right of fishing in the *jhil* did not in itself convey any property in the soil: *Lukhee Dasee v. Khatimah Beebee* (5). Why the owner of *jalkar* right in the river has or may have an enjoyment of that right co-extensive with the waters of the river which permanently form part of it, though they have changed their course, is not stated. Not improbably it rested on local custom, for the Bengal Alluvion and Diluvion Regulation (XI of 1825) is careful in a cognate matter to keep local custom alive. At any rate the principle was well established as early as 1803 that a right of fishery follows the river whatever course it may take, for the ground on which in *Gopee Nath's Case* (4) the Sudder Court allowed the appeal from the Court below, which had acted on this principle, is simply that in point of fact the *jhil* in question, though formed by the river's overflow, was no longer so connected with

it as to form part of the river. This was long considered to have been the effect of these decisions. Mr. Sevestre's note upon them in Vol. 2, p. 467, of his Report is,

"A general right of fishery in a river, when not otherwise defined, is restricted to the channel of the river and water considered to form part of it, not extending to adjacent lakes or other pieces of water occasionally supplied by overflowings of the river but not actually connected with the channel of it."

The rule was so applied in 1856 *Nubhishen Roy v. Uchchootanund Gosain* (6) and in *Ramanath Thakoor v. Eshanchunder Bonnerjee* (7). In the former it was held that the right of *jalkar* in the river was confined to the river and streams flowing into or from it, exclusive of *jhils* not connected with the channel but extending to watercourses which though not immediately within the great channel of the river adjoin or flow into it or are supplied therefrom; "their right consists of the flowing stream and the adjuncts flowing from or into it." In the latter the limitation of the river's adjuncts flowing from or into it was held not to extend to adjacent sheets of water with which the river communicates only when in flood.

"We think", says the Court, "the grant of *jalkar* must be construed as *prima facie* confined to the rivers and sheets of water communicating therewith to which the plaintiff might get access without trespassing on the land."

It is true that these two decisions do not specifically deal with the case of the changed channel of deltaic stream, but they do clearly lay down rules for defining the area of the waters in which the *jalkar* right is to be enjoyed, which carry it beyond the limits of actual navigability though confining it to waters which are adjuncts of the navigable stream. They make the right depend on the identity of the river in which it is enjoyed and do not confine it to such waters of that river as are superimposed on the very land once owned by the grantor of the right. The current of decision was not unruffled by doubts. The Court observes in 1859, in *Guerieb Hossein Chowdhree v. Lamb* (8).

"The part of the country through which the Megna flows is intersected with innumerable creeks into which the tide from the main river flows. The right of fishing in these tidal

(3) [1807] 1 S. D. A. R. 221=1 Morley's Dig. 561.

(4) [1808] 1 Mac. Sel. Rep. 228=2 Sevestre. 467 note

(5) [1863] 2 S. D. A. R. 51.

(6) [1856] 12 S. D. A., 878=2 Sevestre R. 465 note.

(7) [1863] 2 Sevestre 463.

(8) [1859] 20 S. D. A. R. 1357.

creeks belongs of right to the owner of the property into which they flow."

But this case is explained by the fact that the part of the river in question was almost, if not quite, an arm of the sea. An opinion was indicated in 1864, though not absolutely necessary to the decision, in *Sibessury Dabee v. Lukhy Dabee* (9) that the extension of rights of fishery, in consequence of an expansion of the river in which they were enjoyed, ought to depend, as questions of alluvion would, upon the rapidity of the expansion. If sudden, it would work no change in the ownership of the submerged soil, and so cause no extension of the *jalkar* right; it would do both if it took place by gradual and imperceptible advances. The Court here inclined to connect the right of fishing indissolubly with the right to the soil subjacent to the waters in which the fishery right was enjoyed. In 1866 came two somewhat contradictory decisions. The Court in *Nobinchunder Roy Chowdry v. Radha Pearee Debia* (10), scouted as "preposterous" a claim to follow the diverted waters in which the plaintiff had the fishery, but this was without discussion of the authorities, and the claim was alleged not against the owner of the soil over which the diverted waters flowed but against the owner of the fishery in the waters of another river into which the plaintiff's river had burst and discharged itself. In the second case, *Gobind Chunder Shaha v. Khaja Abdool Gunny* (11) the plaintiff and defendant, joint owners of land and of a fishery, had made a partition of the land but not of the fishery and the plaintiff sought to oust the defendant from fishing over the land, which now belonged exclusively to him but had been overflowed by a change in the course of the waters. Sir Barnes Peacock in dismissing the suit observes

"still the fishery existed in that part of the river out of which the fish was taken, although by a change in the course of the river it ran over the portion of the land which was allotted to the plaintiff under the *butwara* partition."

Again, in 1873 *Krishnendro Roy Chowdhry v. Maharani Surno Moyee* (12) the Court somewhat reluctantly followed the rule, which it deemed to be settled, that the owner of the fishery where the river's

channel has changed has "a right to follow the current," that he

"may not only follow the river to any channel which it may from time to time cut for itself, but may continue to enjoy together with the open channel all closing or closed channels abandoned by the river right up to the time when the channel became finally closed at both ends."

Upon the facts of that case it is the latter part of this proposition that is directly involved in the decision. The whole question was learnedly reviewed by Mr. Lal Mohan Doss in 1891 in his Tagore Lectures on the law of Riparian Rights, (pages 372 *et seq.*) who, while admitting a settled current of authority in India to the contrary, urges the very arguments and conclusions of the now respondents and relies on the same authorities. Nevertheless, after this discussion had brought the question again before the Courts and the profession, the High Court in a critical decision affirmed the long-standing rule. This was in 1890 in the case of *Tarini Churn Sinha v. Watson & Co.* (13). The questions were directly raised:

"Can a right of *jalkar* in a public navigable river exist apart from the right to the bed of the river, or must it necessarily follow that right?"

"Do the defendants lose their vested right by a change in the river's course, though the river still is navigable and subject to public right?"

This case raised the very question which has been in debate before their Lordships, for the change in the river's course was a sudden one taking place in the course of a single year and not by imperceptible or slow encroachment. The answer given by the Court was in favour of the owner of the right of fishing in the river. It purported to follow a converse decision in *Grey v. Anund Mohun Mostro* (14), and decided that

"so long as the river retains its navigable character it is subject to the rights of the public, and the fishery remains in the person who was grantee from the Government"

In *Grey's Case* (14), a change of channel had left an old bed either dry or containing only pools disconnected with the river, and it was held that what the river had abandoned, albeit part dry land and part *jhils*, became private property. Thenceforth it belonged to the riparian owners who could claim settlement of it from Government, and the reason given is that

(13) [1890] 17 Cal. 963.

(14) [1864] W. R. Gap, No. 108.

(9) [1864] 1 W. R. 88.

(10) [1866] 6 W. R. 17.

(11) [1866] 6 W. R. 41.

(12) [1873] 21 W. R. 27.

"the right of the defendant" (the owner of the fishery), "being granted out of and part of the Government's right to the river, no longer exists when the Government's right is itself gone."

Thus it will be observed that in *Tarini's Case* (13), the Court conceived itself to be reducing the subject to symmetry by deciding that while on the one hand the owner of the fishery rights in the river lost them where there was permanent recession of the river, he increased them where there was permanent advance of the river.

In the latter case the Court disregarded the conception of Government right to the river as being an incident of Government right to the subjacent soil, and treated the Government right and the right of its grantee in respect of the fishery as subsisting in the river wherever that river might flow, and not as subsisting in the flowing water only where and so long as it flowed over soil vested in the Government. This view has since been treated as established. That the *jalkar* right in the river extends over a piece of water formed originally by the river, but so far dried up as to be disconnected from it, except in the rains, during and just after floods, was decided in 1905 in *Jogendra Narayan Roy v. Crawford* (15). The ground of the decision is that such water is still part of the river system and when that is so in fact the right of fishing persists in respect of it. This is the case of retrocession. So too in the case of *Bhaba Prasad v. Jagadindra Nath Rai* (16), in the same year the principle is thus expressed

"the *jalkar* rights were settled with the plaintiffs' predecessor many years ago. The plaintiffs by virtue of the settlements conferred upon them are entitled to exercise the right of fishery in the said river wherever it flows within the limits prescribed in the settlement itself."

Both these cases purport to follow *Tarini's Case* (13), which was a case of an advance of the river into a newly formed channel, and the rest of a long line of settled authorities. It must now be taken as decided in Bengal that the Government's grantee can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the up-stream and down-stream limits of his

grant, whether the Government owns the soil subjacent to such waters as being the long-established bed or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment.

Their Lordships were strongly and ably pressed to disregard, or at least to qualify these decisions. The points made were (a) that in principle the right to grant a several fishery in tidal navigable waters is so essentially connected with the right to the soil and the bed of the channel, that no fishery right can exist where the grantor of the several fishery never has owned the subjacent soil; (b) that in any case the acquisition of fresh waters can go no further and can proceed no otherwise than the acquisition of fresh soil by alluvion, and therefore that an expansion of waters within which a *jalkar* right exists can only carry with it an extension of the *jalkar* right if it has taken place by imperceptible encroachments upon the land, and not by sudden irruption; and (c) that it would be grossly unjust to hold that the natural misfortune which swamps a landowner's soil by a river's encroachment should be accompanied by a legal ouster from such enjoyment as the natural disaster has left him.

In extension of the last point, it was argued that the disputed site in fact covered the sites of former enclosed jhils which belonged to and had been enjoyed by the defendants and that no trespass could be committed as against the plaintiffs in any view by fishing where the defendants had formerly been accustomed and entitled to fish in waters overlying their own land. This question of fact, which seems not to have been passed upon by the Courts below, was not sufficiently made out, but even if it were, it appears to be covered by the general argument.

For these contentions reliance was placed on the *Mayor of Carlisle v. Graham* (17), where Kelly, C. B., says:

"We are called upon to decide the question which now arises for the first time: Is the several fishery of a subject in a tidal river, the waters of which permanently recede from a portion of its course and flow into and through another course, where the soil and the land on both sides of the new channel thus formed belong to another subject, transferred from the old to the new channel, and so a several fishery created in and throughout

(15) [1905] 32 Cal. 1141=2 C.L.J. 569.

(16) [1905] 33 Cal. 15=9 C.W.N. 934.

(17) [1869] 4 Ex. 361=21 L. T. 133=38 L. J. Ex. 226=18 W.R. 318.

such new channel, or in some, and if any in what part of it? In the case of *Murphy v. Ryan* (18), O'Hagan, J., in delivering the judgment of the Court, says, 'but whilst the right of fishing in fresh-water rivers in which the soil belongs to the riparian owner is thus exclusive, the right of fishing in the sea its arms and estuaries and in its tidal waters, wherever it ebbs and flows, is held by the common law to be *publici juris* and so to belong to all the subjects of the Crown; the soil of the sea and its arms and estuaries and tidal waters being vested in the Sovereign as a trustee for the public. The exclusive right of fishing in the one case and the public right of fishing in the other, depend upon the existence of a proprietorship in the soil of the private river by the private owner and by the Sovereign in a public river respectively.' And this is the true principle of the law touching a several fishery in a tidal river. If therefore the right of the Crown to grant a several fishery in a tidal river to a subject is derived from the ownership of the soil, which is in the Crown by the common law, a several fishery cannot be acquired even in a tidal river if the soil belongs not to the Crown but to a subject. And all the authorities, ancient and modern, are uniform to the effect that if by the irruption of the waters of a tidal river a new channel is formed in the land of a subject, although the right of the Crown and of the public may come into existence, and be exercised in what has thus become a portion of a tidal river of an arm of the sea, the right to the soil remains in the owner, so that if at any time thereafter the waters shall recede and the river again change its course, leaving the new channel dry, the soil becomes again the exclusive property of the owner, free from all right whatsoever in the Crown or in the public."

With this case has to be considered also *Foster v. Wright* (19). There the proprietor of a right of fishing in the Lune at that part neither tidal nor navigable, was held entitled to "follow his river" when the river had so far shifted its course as to flow over another's land, and the person, to whom the land which came to form its new bed had previously belonged, was held to be a trespasser when he fished in its new channel. The change of bed had been gradual, perceptible and measurable over considerable periods of time, but from week to week imperceptible. It was held that the imperceptible changes had had the effect of producing an accretion to the land of the owner of the fishery, and that

"the river had never lost its identity nor its bed its legal owner" (page 446); "he has day by day and week by week become the owner of that which has gradually and imperceptibly become its present bed, and the title so gradually and im-

perceptibly acquired cannot be defeated by proof that a portion of the bed now capable of identification, was formerly land belonging to the defendant or his predecessors-in-title."

Mayor of Carlisle v. Graham (17), was distinguished on the ground that in that case the river bed was a new bed, not formed by the gradual shifting of the old one but totally new, the old bed remaining recognisable in its old site but deserted. The Eden became a river with two beds; the Lune was at all times a river with only one though an ambulatory one. As counsel in *Foster v. Wright* (19), boldly argued for the right to "follow the river" in its Indian sense saying (page 440), "even a sudden and violent change in its course would not have taken away" the plaintiffs' right, and as the adoption of that *a fortiori* view would have made all consideration of gradual accretion immaterial, the decision must be regarded as one which negatives the contention of the respondents in the present case. As with the river Lune so the part of the river Eden which was in question in the *Mayor of Carlisle v. Graham* (17), is one which does not appear to be subject to frequent change. How the law might be if conditions similar to those of Bengal could occur in England is another matter.

The above cases would have been more directly in point had the river in question been one which often and swiftly changes its course, as for instance the tidal Severn, of which Hale writes (Hargrave's Law Tracts, p. 16)

"that river which is a wild unruly river, and many times shifts its channel, especially in that flat between Shinberge and Aure is the common boundary between the manors on either side, viz, the *filum aquae* or middle of the stream, and this is the custom of the manors contiguous to that river from Gloucester down to Aure."

There is in this part of the Severn an ancient several fishery, enjoyed by the Lords of Berkeley under charters of Henry I, Richard I and John, which must be much more analogous to the jalkar in the present case than cases in the rivers Eden or Lune. A somewhat similar instance in Scotland is mentioned by Lord Abinger in *In re Hull and Selby Ry. Co.* (20), but the question of the right to follow the river does not appear to have arisen for decision in these cases.

It was admitted that the common law of England as such does not apply in the

(18) [1868] 2 Ir Rep. C. L. 143=16 W. R. 678.

(19) [1878] 4 C. P. D. 438=49 L. J. C. P. 97=44 J. P. 7.

(20) [1839] 5 M. & W. 327=8 L. J. Ex. 260=52 R. R. 733.

mofussil of Bengal, but the argument was that principles established under and for English conditions afford a sound guide to the rules which should be enforced in India. Their Lordships have given these arguments careful consideration, though they would in any case be slow to disturb decisions by which rules have been established for Bengal governing extensive and important rights such as rights of *jalkar*, and unless they could be shown to be manifestly unjust or flagrantly inexpedient, their Lordships would not supersede them. The Indian Courts have in many respects followed the English law of waters. Sometimes their rules are the same; sometimes only similar. *Jalkar* may exist not only as a right attaching to riparian ownership but also "as an incorporeal hereditament, a right to be exercised in the tenement of another" *Forbes v. Meer Mahomed Hossein* (21) as a *profit a prendre in alieno sole* *Lukhee Dasee v. Khatimah Beebee* (5). In navigable waters such rights are granted by the Government of India, or, what is equivalent to a grant, settled with the grantee under the Revenue Settlement by the Government, and are thus derived from the Crown: *Prosunno Coomar Sircar v. Ram Coomar Parooey* (22). The freehold of the bed of navigable waters was deemed to be in the East India Company as representing the Crown and now is vested in the Government of India in right of the Crown *Doe, dem. Seeb Kristo Banerjee v. East India Co.* (23), *Nogender Chunder Ghose v. Mahomed Esof* (24). Where the bed thus forms part of the public domain the public at large is *prima facie* entitled to fish. Thus the English analogy has been closely followed. Again, the sudden invasion of a private owner's land by the waters of a navigable river does not divest the property in the soil. If the change in the course of the navigable river results in the water in the new course being in fact navigable (that is, capable of being traversed by a boat at all seasons, *Chunder Jaleea v. Ram Chander Mookerjee* (25), *Mohi-*

nee Mohun Doss v. Khajah Ahsanoollah (26) the flooded land-owner must submit to have his land traversed by the vessels of the public in the course of navigation and cannot in right of his ownership erect works on his flooded soil to the obstruction of the navigation. None-the-less he remains the owner, and should the waters permanently retire his full rights as owner revive unless lapse of time or circumstances, or both, suffice to prove an abandonment of his rights of ownership for his part.

Still, there is one step which the Indian law has never taken, far as it has gone in the adoption of English rules. Often as the opportunity for so doing has arisen it has never been held that the capacity of the Government of India to grant to or settle with a private owner the exclusive right of fishing in tidal navigable waters is so indissolubly bound up with its ownership of the soil subjacent to those waters that, no matter how those waters may subsequently change their course, while still remaining part of the same river system within the up-stream and down-stream limits of the grant, the enjoyment of the right so granted cannot extend beyond the limits of the Government's ownership of the soil lying perpendicularly underneath them, as it may vest from time to time. It is one thing to presume the soil of the bed of a tidal navigable river to be vested in the Crown and to hold that the Government of India in right of the Crown can grant the fishery in the super-incumbent waters in severalty and quite another to hold that the several fishery when once thus created is for ever enjoyable only in waters that continue to flow precisely over ground which was in the Crown at the date of the grant. "Whether the actual proprietary right in the soil of British India" says Garth, C. J., in the case of *Hori Das Mal* (1) already cited

"is vested in the Crown or not (a point upon which there seems some diversity of opinion) I take it to be clear that the Crown has the power of making settlements and grants for the purposes of revenue of all unsettled and unappropriated lands, and I can see no good reason why they should not have the same power of making settlements of *jalkar* rights and of lands covered by water as of land not covered by water. In either case the settlement is made for the purpose of revenue and for the benefit of the public."

(21) [1873] 12 B. L. R. 210=20 W. R. 44.

(22) [1878] 4 Cal. 53=3 Jur 214.

(23) [1856] 6 M. I. A. 267=10 M. P. C. C. 140=19 Eng. Rep. 100=110 R. R. 21=1 Sar 540 (P. C.).

(24) [1872] 10 B. L. R. 406=18 W. R. 113.

(25) [1871] 15 W. R., 212.

(26) [1872] 17 W. R. 73.

Again, the rights of the Crown are thus stated in *The Collector of Maldah v. Syed Sudurooddeen* (28).

"The right to resume land is one based on the right of the Government to a portion of the produce of every *beegah* of the soil as revenue, whereas the claim to possession of the jalkars of rivers not forming portions of settled estates is founded upon a supposed right in Government as trustees of the waterways of the country to possess and to assign the exclusive possession of them to any individual it chooses on the payment of revenue for them in the shape of a fishery rent."

Hurreehur Mookerjee v. Chundeechurn Dutt (29), *Collector of Rungpore v. Ramjadub Sein* (30). See, too, *Radha Mohan Mundul v. Neel Madhub Mundul* (31), and *Satcowri Ghosh Mondal v. Secretary of State* (32), where the cases are collected and discussed.

In truth the rule which in the United Kingdom thus connects the subject's right to an exclusive fishery in tidal navigable waters with the limits of the Crown's ownership of the subjacent soil is itself the result of conditions partly historical and partly geographical which have no counterpart in Lower Bengal. In Bracton's time this rule would seem to have been unknown; at any rate he ignores it, and treats the right of fishing in rivers, as did the Roman law, as a right *publici juris*. Whether in his time this was at common law orthodox or heterodox, or whether he supplemented the defects of our insular system by a reversion to that of Rome, need not now be considered. What is clear is that during the many years between his time and Hale's the generality of the right of river-fishing, if it ever had been the doctrine of the common law, was such no longer. According to Hale (*De jure maris*, page 1, Chapter 4; Hargrave's Law Tracts, page 11).

"The right of fishing in the sea and the creeks and arms thereof is originally lodged in the Crown as the right of depasturing is originally lodged in the owner of the wastes whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. . . . The King is the owner of this great waste, and as a consequence of his propriety has the primary right of fishing in the sea or creeks or arms thereof."

Be it observed that this doctrine may be called essentially insular, and that the

proofs of it which Hale adduces are purely English, namely, Close Rolls, Parliament Rolls, and Rolls of the King's Bench mainly in Plantagenet times, and that he places on Bracton's Roman doctrine an interpretation, confining it to rivers which are arms of the sea which is itself a dissent from that doctrine.

The question how far a rule established in this country can be usefully applied in another, whose circumstances, historical, geographical, and social, are widely different, is well illustrated by the case of navigability, as understood in the law of the different States of the United States of America. Navigability affects both rights in the waters of a river, whether of passing or repassing or of fishing, and the rights of riparian owners, whether as entitled to make structures on their soil which affect the river's flow, or as suffering in respect of their soil *quasi-servitudes* of towing, anchoring or landing in favour of the common people. The Courts of the different States, minded alike to follow the common law where they could, found themselves in the latter part of the eighteenth and the early part of the nineteenth centuries constrained by physical and geographical conditions to treat it differently. In Massachusetts, Connecticut, New Hampshire and Vermont, where the rivers approximated in size and type to the rivers of this country, the English common law rule was followed, that tidality decided the point at which the ownership of the bed and the right to fish should be public on the one side and private on the other. Other States, though possibly for other reasons since they possessed rivers very different in character from those of England, namely, Virginia, Ohio, Illinois, and Indiana followed the same rule. But in Pennsylvania, North Carolina, Iowa, Missouri, Tennessee, and Alabama, this rule was disregarded, and the test adopted was that of navigability in fact, the Courts thus approximating to the practice of Western Europe (*see* Kent's Commentaries, iii, 525). The reasoning has been put pointedly in Pennsylvania. Chief Justice Tilghman says in 1810, in *Carson v. Blazer* (33)

"the common law principle concerning rivers" (*viz.*, that rivers, where the tide does not ebb and flow, belong to the owners of adjoining lands on either side), "even if extended to America, would

(28) [1864] 1 W.R. 116.

(29) 17 S.D.A.R. 641.

(30) [1863] 2 Sevestre Rep. 373.

(31) [1875] 24 W.R. 200.

(32) [1894] 22 Cal. 252.

(33) [1810] 2 Binney 477 = 4 Am. Dec. 463.

not apply to such a river as the Susquehanna, which is a mile wide and runs several hundred miles through a rich country, and which is navigable and is actually navigated by large boats. If such a river had existed in England no such law would ever have been applied to it."

(See too, *Shrunk v. Schuylkill Navigation Co.* (34). Thirty years later in *Zimmerman v. Union Canal Co.* (35), President Porter observes

"the rules of the common law of England in regard to the rivers and the rights of riparian owners do not extend to this Commonwealth, for the plain reason that rules applicable to such streams as they have in England above the flow of the tide, scarcely one of which approximate to the size of the Swatara, would be inapplicable to such streams as the Susquehanna, the Allegheny, the Monongahela," and Sundry other "rivers of Damascus."

A similar deviation, equally grounded in good sense, from the strict pattern of the English law of waters lies at the bottom of the current of Indian cases previously referred to, and forms its justification.

In proposing to apply the juristic rules of distant time or country to the conditions of a particular place at the present day, regard must be had to the physical, social and historical conditions to which that rule is to be adopted. In England the rights of the Crown and other rights derived from them have long been established by authority, even though their historical origin is imperfectly known or conjectural. The result may be that the law is quite certain and yet is based on considerations of history and precedent which are quite the reverse. In Bengal a special history, and a special theory of rights, tenures and obligations, condition the rules applicable to such an incorporeal hereditament as that now in question. In England we go back before Magna Charta for the commencement of several fisheries in tidal navigable waters, and know little of their actual origin. In Bengal it is sufficient to say that at the time of the decennial or the permanent settlement, or since, such rights, though possibly descending from remote antiquity, were settled with the Government of India, whose special position, originating on 12th August, 1765, when the East India Company became receiver-general in perpetuity of the revenues of Bengal, Orissa and Behar, is historically well

known. English tenures and Bengal zemindari rights, unduly assimilated at one time, have never fully corresponded to one another. Above all the difference, indeed the contrast, of physical conditions is capital. In England the bed of a stream is for the most part unchanging during generations, and alters, if it alters at all, gradually and by slow processes. In the deltaic area of Lower Bengal, change is almost normal in the river systems, and changes occur rarely by slow degrees, and often with an almost cataclysmal suddenness. If English cases were applied to Bengal, so that the area of enjoyment of a several fishery in tidal navigable waters should be limited to the area within which the Crown, the assumed grantor of the fishery, had owned the subjacent soil at the time of its grant, who could say from time to time what the bounds of that enjoyment are, and where the ownership of the soil is to be delimited? The course of the waters has been in flux for ages: at what date is this ownership to be taken?

As Lord Abinger says of the rule of gradual accretion of soil in *In re Hull and Selby Ry.* (21) the theoretic basis of which has been variously stated from the time of Blackstone to the present day (see the different theories collected by Farwell, L. J., in *Mercer v. Denne* (36)) "the principle is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property." Take which date you will, the ever-shifting river does not run now where it ran then, and if the ownership of the soil remains as it was, it is sheer guesswork to say in which part of the present waters the grantee of *jalkar* rights shall enjoy his several fishery under his grantor's title, and in which parts he must abstain, since the waters flow over the soil of private owners? Any given section of the river system is in all probability a shifting and irregular patchwork of water flowing over soil which belonged to the Sovereign at the selected date and of water flowing over soil then belonging to other owners and since encroached upon, with the background of a probability that before the date in question, and yet within historic times, no

(34) [1826] 14 Sergeant & Rawle 71.

(35) [1856] 1 Watts & Sergeant 351.

(36) (1905) 2 Ch. 538=70 J. P. 64=
3 L.G.R. 1293=93 L.T. 412=74 L.J. Ch. 723=
54 W. R. 303=21 T. L. R. 760.

water may have run there at all. By what analogy can rules applicable to the Eden and the Lune be profitably applied to such physical conditions?

It was urged that the established rule with regard to alluvion should be applied to rights of *jalkar*; that since the right to accretions and the liability to derelictions of soil attached only to gradual accretions or to erosions taking place by imperceptible degrees, so too the right of the owner of the fishery to "follow the river" ought to be limited to cases where the river's encroachment were gradual, and ought not to be extended to an irruption as sudden and accomplished as rapidly, as was the formation of the channel in question in the defendants' lands. It is to be observed that here too Indian law doubtless guided by local physical conditions, has adopted a rule varying somewhat from the rule established in this country. Where under English conditions the rule applies to "imperceptible" alterations, Regulation XI of 1825, Articles 1 and 4, speak of "gradual accession."

The analogy of the English Rule can hardly be prayed in aid when Indian legislation has thus an established and different rule on the same subject. Further, as the Indian rule is established now beyond question, it may perhaps be said without offence of the Indian as of the English Rule, that it represents rather a compromise of convenience than an ideal of justice, for that which is a man's own does not become another's any more agreeably to ideal justice by being filched from him gradually instead of being swallowed whole. In any case the analogy is not in *pari materia*. Property in the soil is one thing; enjoyment of a profit *a prendre* in flowing water may in some respects be another. True, the profit *a prendre* is to be enjoyed *in alieno solo*; such is its nature. True too that at the time of the grant, the grantor has no power to create this incorporeal hereditament where his ownership of the soil does not extend; but when the power to grant arises from sovereignty, and has never been decided to be limited to the bounds of the grantor's proprietorship as it may continue to exist from time to time, the mere fact that the *jalkar* right is classified in the language of the English law of real property as a profit *a prendre in alieno solo* does not prevent its proprietor from be-

ing entitled to follow the river in its natural change. The fish follow the river and the fisherman follows the fish; this may be right or wrong, but the question is not settled by asking under what circumstances of natural physical change the proprietor of an acre of dry land, which has vanished from sight, can claim to have still vested in him an equal area of river-bed on the same site, or another acre of dry land transferred by the river and attached by accretions to another proprietor's land.

Lastly, it is said to be unjust that a landowner should not only lose the use of his land when the river overflows it, but also the right to fish over his own acres and in his own waters, in order that another may unmeritoriously fish in his place. There is some begging of the question here; the waters, are not his waters, nor is the change confined to the flooding of his fields. It is the river that has made his land its own; the waters are the tidal navigable waters of the great stream. In physical fact the land-owner enjoys his land by the precarious grace of the river, whose identity is so persistent, and whose character is so predominating, as almost to amount to personality; and is it fundamentally unjust that in law too he should lose what he has lost in fact, and be precluded from taking in substitution for his lost land an incorporeal right which has been granted not to him but to another? The sovereign power lawfully invests its grantee with *jalkar* rights in part of the river; is it unjust that when that river shifts its course, changing in locality but not in function, the owner of those rights should still enjoy them in that self-same river, instead of being despoiled of them by the course of nature, which he could neither foresee nor control? There must be some rule and there must be some hardship. To say the least there is no such proof that one rule is better than the other as would even approach the conclusion that the rule established should now be set aside.

Their Lordships are of opinion that no reason sufficiently cogent has been found to warrant them in disregarding the settled Indian authorities, and being further of opinion that the plaintiffs established their claim at the trial, they will humbly advise His Majesty that the appeal should

be allowed with costs here and below, and that the judgment appealed from should be set aside and the judgment of the Trial Judge restored.

T. R. R.

Appeal allowed.

Solicitors for Appellants—Watkins and Hunter.

Solicitors for Respondents—Theodore Bell and Co.

**** A. I. R. 1914 Privy Council.**
(FROM BOMBAY).

17th March, 1914.

LORDS SHAW AND MOULTON AND
MR. AMEER ALI.

Chunilal Parvatishankar—Plaintiff.
Appellant

v.

Bai Samarath—Defendant-Respondent.

**** Hindu Law—Will—Construction of Will dealing with self-acquired property—Period of distribution contemplated by the testator—Clause for survivorship with obligation imposed on its taking effect—Gift over to the survivor was intended to take effect whenever the death of a son took place whether before or after the testator's death.**

A Hindu resident of Surat in the Bombay Presidency made a will on 20th August, 1899 whereby his two sons were appointed "executors, heirs and owners of the whole of his property which was self acquired. (Clause 2 of the Will.) The question of survivorship was dealt with in Clause 9 in the following terms:—

"I have divided between and given to my sons Shambhuprasad and Chunilal the whole of my property as mentioned above. But should either of these two sons die without having had (leaving) any male issue, the survivor of the said two sons is duly to take the whole of the property appertaining to the share of the deceased son who may have (leave) no male issue (behind him) after undertaking (to defray) the expenses in connection with the maintenance of his widow and the maintenance and marriage of his minor daughters. But under these circumstances the heirs of my deceased son Surajlal shall not get any right whatever."

The testator died in 1901 leaving his two sons surviving. The elder son died in 1903 leaving a widow and daughter. The surviving son sued for enforcement of Clause 9 of the will.

Held: The terms of Clause 9 were not limited to survivorship occurring before the death of the testator himself and the language of the will clearly pointed to survivorship whenever it should occur, and the survivor was entitled to the estate conveyed by the clause subject to the correlative obligation of maintaining his brother's widow and daughter.

The will of a testator must be construed on that principle which would enable Courts of law most fully to give effect to the intention expressed by his words.

O'Mahoney v. Burdett, 23 W. R. 361; overruled; *Edwards v. Edwards*, 92 R. R. 464 followed; *Allen v. Farthing*, 17 R. R. 223 Referred to.

DeGruyther and *J. M. Parikh*—for Appellant.

Lowndes—for Respondent.

Lord Shaw:—This is an appeal from a decree of the High Court of Judicature at Bombay, dated the 20th July, 1910, reversing a decree of the Court of the District Judge, Surat, dated the 27th August, 1903, which had affirmed with modifications a decree of the Court of the First Class Subordinate Judge, Surat, dated the 4th February, 1907.

The only question for determination in the appeal relates to the construction of a will dated the 20th August, 1899, made by a Hindu named Parvatishankar Durgashankar. He was a resident of Surat in the Bombay Presidency; and it may be at once stated that it was admitted by both parties at their Lordships' Bar that the Hindu Wills Act, Chapter XXI, of the year 1870, did not apply to this case, which falls to be determined not by the law operative within the territories subject to the Lieutenant Governor of Bengal or the local limits of the ordinary original civil jurisdiction of the High Courts at Madras and Bombay. It may well be that the sections of that Act upon interpretation would yield the same result as has been arrived at in the present case. But no decision on that topic is given: and the case is treated as one applying in the mofussil, and therefore to be dealt with on ordinary legal principles. It must also be stated that the various terms employed in the particular will are special, and that no general rule can be said to be precisely applicable in its construction except that the Court must make its best endeavour to extract the intention of the testator.

Parvatishankar, the testator, died on the 4th July, 1901. He left surviving him two sons, Shambhuprasad (who died on the 2nd January, 1903, leaving a widow, the respondent in this appeal, and a daughter) and Chunilal, the appellant. A third son of Parvatishankar, Surajlal, had predeceased his father, but

had left one son. Surajlal had separated from his father many years previous to his death; the other sons were in family with him.

The will was executed about two years before the testator's death and it purports to dispose of the whole of his property. By Clause 2 he appointed his two sons executors, heirs and owners of the whole. In various other clauses details as to the immovable property are given, and directions that his sons are to divide and take in equal shares the whole of it with certain exceptions. In Clause 7 there is a declaration as follows:—

"As to the moveable property which I possessed, I have during my life-time divided the same between my two sons, Shambhuprasad and Chunilal, according to my wishes and have made over the same in their possession."

A certain enumeration with directions is also given as to gold and silver ornaments in his possession. By Clause 8 the testator gives each of his said two sons a half of his estate not specifically disposed of by his will.

It is clear up to this point in the will that the one predominant desire of the testator was that his two sons should have his property between them.

It was in the course of the case, however, found in fact that he had not accomplished, or completely accomplished, this desire. And the will accordingly falls to be appealed to as the governing instrument in regard to the distribution.

The question of survivorship as between these two sons was not dealt with until Clause 9 of the will was reached, and it is in the following terms:—

"I have divided between and given to my sons Shambhuprasad and Chunilal the whole of my property as mentioned above. But should either of these two sons die without having had (leaving) any male issue, the survivor of the said two sons is duly to take the whole of the property appertaining to the share of the deceased son who may have (leave) no male issue (behind him after undertaking (to defray) the expenses in connection with the maintenance of his widow and the maintenance and marriage of his minor daughters. But under these circumstances the heirs of my deceased son Surajlal shall not get any right whatever."

Various issues were raised in the case, including whether the estate in question was self-acquired. This was answered in the affirmative, and that answer is not now disputed. As stated, the one question remaining in the case has reference

to the construction of Clause 9 above quoted. The learned Judges of the High Court of Bombay have held that—

"The period of distribution contemplated by the testator is clearly the period of his death, and under these circumstances the event which may interfere with that distribution and give rise to the necessity for other arrangements must be an event occurring prior to his death."

As already mentioned, Shambhuprasad survived the testator. And the result of the judgment is that one half of the property now to be disposed of, is held to have vested in him *a morte testatoris* and that the whole provision of Clause 9 with reference to survivorship falls, in the events which have occurred, to the ground. The effect of the learned Judges' decree is that the clause must be read as if the survivorship there provided for was limited to survivorship as at the testator's death.

Their Lordships are clearly of opinion that this judgment cannot be maintained. There is nothing specifically either English or Indian in the idea that the Will of a testator must be construed on that principle which would enable Courts of Law most fully to give effect to the intention expressed by his words. It may be that if the words he employs are *voces signatae* they must be so accepted, whatever the suspicion may be as to the testator having had that particular view of his own language. But in ordinary circumstances ordinary words must bear their ordinary construction, and the whole Will, that is, the whole of the words employed by the testator, must be looked at together so as to determine his whole intention. Furthermore, it is not on this principle legitimate to take words which have a general meaning and subject them to limitations which the words do not necessarily imply. It may be true that there is a body of older cases which would warrant a suggestion that the term employed in this Will, namely, "should either of these two sons die without having had (leaving) any male issue" should be limited to such death occurring before the death of the testator himself, but the Will does not say that, and it has for many years been a settled principle that words of this class, being in general terms, must receive their full, and not a restricted, meaning.

The leading authority on the subject is, of course, *O'Mahoney v. Burdett* (1) and two sentences of Lord Hatherley's opinion may be here repeated. He refers to the duty of the Courts always to consider carefully the whole will

"and, having regard to all the various clauses contained in it, to see what is the full and complete and perfect intention of the testator."

He corrects the case of *Edwards v. Edwards* (2), and makes the statements of the principle run thus:

"That the period to which the executory devise will be referred will be the period of the death of the first taker, unless there are other circumstances and directions in the will which are inconsistent with that supposition."

If it did not appear presumptuous to say so, one might comment on the case of *O'Mahoney v. Burdett* (1) as one which emerged through a thicket of technical decisions to a ground of plain and pre-eminent good sense. It was also, of course, fortified by authority, and notably by the case of *Allen v. Farthing* (3), the fullest report of which was given by Mr. Jarman in his work on "Wills". (6th edition, page 2160.)

But so far from the language employed in the present will leaving any serious ambiguity as to the intention of the testator, their Lordships are of the opposite opinion. In their view the words clearly point to survivorship whenever it should occur. When Shambhuprasad, having, with his brother Chunilal, survived his father, died, leaving a widow and a daughter, the language employed to cover such a situation seems exact and clear.

"Should either of these two sons," it says "die without having had (leaving) any male issue, the survivor . . . is duly to take the whole of the property appertaining to the share of the deceased son who may have (leave) no male issue"

And, as if this were not sufficient, the will proceeds to lay upon the surviving brother a duty in the event of that survivorship in the following language:

"After undertaking (to defray) the expenses in connection with the maintenance of his widow and the maintenance and marriage of his minor daughters."

It seems to their Lordships that it would be a strained construction of a will

in that form (which manifestly contemplates death occurring at any time—with the receipt of property by way of survivorship—on the one hand, and the duties to be laid upon the survivor at any time, on the other hand) to say that the whole of these provisions fall to the ground; although Shambhuprasad had in point of fact left no male issue, because he did not die in that situation before the testator himself. The testator, in their Lordships' opinion, had clearly in view a much wider and more general provision, and they think that the events which have in fact occurred, *viz.*, the survival of the testator by his two sons and the death of one of these sons leaving a widow and daughter but no male issue, are events to which the will has operative application. They accordingly do not doubt that Chunilal, the surviving son, is, as such survivor, entitled to the estate conveyed by this clause, and that the correlative obligation resting upon him comes into play.

Their Lordships desire to put on record an admission made by Counsel for the appellant to the effect that he had no knowledge of any property of the deceased testator in possession of the respondent, Shambhuprasad's widow, and that, if the respondent came into possession of such property under arrangements made in the life-time of her husband with his brother the appellant, the present judgment would not be used to disturb such an arrangement.

Their Lordships do not feel themselves able to give effect to the argument presented under Section 42 of the Specific Relief Act or to interfere with the judgment of the District Judge on this question of procedure.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and that the cause be remitted to the High Court in order that upon provision being made and security being given to its satisfaction for the maintenance of the respondent and for the maintenance and marriage expenses of the minor daughter a declaration and injunction be given in terms of the plaint. In view of the special difficulties in the construction of the will the appellant will pay to the respondent all costs incurred

(1) [1874] 7 H. L. 388=44 L. J. Ch. 56=23 W. R. 361=31 L. T. 705.

(2) [1852] 15 Bev. 357=16 Jur. 259=21 L. J. Ch. 324=92 R. R. 464.

(3) [1816] 2 Madd. 310=17 R. R. 223.

by her before this Board and in the Courts below.

T. A. R.

Appeal allowed.

Solicitors for Appellant—E. Dalgado.

Solicitors for Respondent—T. L. Wilson and Co.

*** A. I. R. 1914 Privy Council.**

(FROM ALLAHABAD.)

18th May, 1914.

LORD PARKER OF WADDINGTON, SIR JOHN EDGE AND MR. AMEER ALI.

Shoharat Singh and others—Defendants Appellants

v.

Mt. Jafri Bibi—Plaintiff-Respondent.

**Muhammadian law—Shiah law—"Muta" or temporary marriage and its incidents as distinguished from a "Nikah" marriage—Term of "Muta" marriage need not be expressly extended.*

A Muta marriage according to Shiah Law is a temporary marriage, its duration being fixed by agreement between the parties. It confers on the wife no right or claim to her husband's property, but children conceived while it exists are legitimate and capable of inheriting from their father.

A Nikah marriage is a religious ceremony and confers on the woman the full status of wife and children born after it are legitimate.

[P. 64, C. 1.]

The original term for which a Muta marriage is contracted may be extended by agreement and in the absence of evidence to the contrary, if cohabitation originated in a "Muta" marriage, the proper inference is that the "Muta" continued during the whole period of cohabitation.

[P. 64, C. 1.]

A Shiah Muhammadan contracted a Muta marriage with a woman and had two daughters by her. He then performed "Nikah" with her and had a third daughter.

Held, The three daughters were co-heirs and entitled to equal shares. The claim of the two was barred. Nevertheless, the third was entitled to one-third share only. [P. 64, C. 2.]

DeGruyther, and B. Dube—for Appellants.

Lowndes—for Respondent.

Lord Parker :—The questions which arise for decision on this appeal are substantially questions of fact only. Was Muhammad Kazim ever married to Achchhi Bibi, and if so, when, and were there any children of the marriage? There is no doubt that Muhammad Kazim left three daughters by Achchhi Bibi him surviving, of whom the plaintiff was the youngest, and that those three daughters, if legitimate, were entitled to succeed to his property as co-heirs. But the defendants to the action (the now

appellants) allege that they were illegitimate, or alternatively that if the plaintiff was legitimate, so also were her sisters, so that the plaintiff was entitled to succeed to one-third only of her father's property. The plaintiff (the now respondent) alleges on the other hand that although her father and mother lived together as man and wife for many years they were married about 1½ years before she was born and not earlier, that she therefore was his only legitimate child.

The plaintiff tendered in proof of the marriage of her parents a deed said to have been executed by Muhammad Kazim on the 11th April, 1884, a translation of which will be found at page 90 of the record, and also the depositions of several witnesses who deposed to the marriage ceremony having taken place in their presence about the same date. The Subordinate Judge was of opinion that the deed was a forgery, and that these witnesses were not telling the truth. The High Court having before it additional evidence of considerable importance came to a contrary conclusion, holding that the deed was genuine and that the marriage ceremony had been performed as deposed to by the witnesses. The present appeal is from this decision of the High Court.

The deed in question is a deed of dower. In it Muhammad Kazim, who was a Mohammadan of the Shia sect, declared that Achchhi Bibi had been living with him for some years past, and that he had contracted *Muta* with her in the beginning; that owing to their mutual love and affection he had long intended performing *Nikah* with her, but owing to certain circumstances, as well as to the unwillingness of some members of his family, he could not do so; that a suit was recently instituted on his behalf in which his deposition was taken; that in this deposition he had not considered it advisable to admit his *Muta* with Achchhi Bibi; that she came to know of this, and by reason of it a disagreement took place between them; that as he had made up his mind before this to perform *Nikah* with her and as it was also necessary to remove the disagreement between them he had of his own free will and accord performed *Nikah* with Achchhi Bibi at a dower of Rs. 50,000, at a general meeting at which *raises* and *res.*

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pectable residents of the city were present; hence he had executed that deed as a memorandum of the dower and *Nikah* that it might be of use in time of need.

A *Muta* marriage is, according to the law which prevails among Shias, a temporary marriage, its duration being fixed by agreement between the parties. It does not confer on the wife any right or claim to her husband's property, but children conceived while it exists are legitimate and capable of inheriting from their father. A *Nikah* marriage is a religious ceremony, and confers on the woman the full status of wife, and children born after it are legitimate.

If the deed in question be a genuine deed, and the statements in it be taken as true, then not only was there a *Nikah* marriage between Muhammad Kazim and Achchhi Bibi at or about the time of its execution, but their cohabitation originated in a *Muta* marriage. There is no evidence as to the original term for which this *Muta* marriage was contracted, but such term, whatever it was, may from time to time have been extended by agreement; and in their Lordships' opinion, if it be once proved that the cohabitation originated in a *Muta* marriage, the proper inference would, in default of evidence to the contrary, be that the *Muta* continued during the whole period of cohabitation.

Besides the deed itself there is ample corroborative evidence of the *Nikah* marriage there referred to, if the witnesses called to depose to the actual ceremony are treated as worthy of credit. There is also some corroborative evidence of the *Muta* marriage.

After careful consideration of all the evidence their Lordships have come to a conclusion that they ought not to reverse the findings of the High Court as to the genuineness of the deed of dower or the credibility of the witnesses who deposed to the celebration of the *Nikah*. The Judges who were parties to these findings have necessarily a large experience in matters of this nature. The Subordinate Judge had no more opportunity than they had of seeing and observing the demeanour of the witnesses, and they on the other hand had evidence before them which was not before the Subordinate Judge. No doubt, as pointed out by the learned Counsel for the appellants, there are good reasons why both the deed itself

and the evidence of the witnesses in question ought to be looked upon with suspicion and scrutinised with great care. Their Lordships do not think it necessary to go into these reasons. It is enough to say that, after scrutinising the evidence with the greatest care, they do not see their way to disturb the findings of the Court below.

There is, however, one matter which does not appear to have been considered by the High Court with the attention which it deserved, and that is the question of the *Muta* marriage. If the deed be treated as a good and valid deed, and the plaintiff's witnesses as reliable witnesses, there is considerable evidence that the cohabitation of Muhammad Kazim and Achchhi Bibi commenced in a *Muta* marriage, and if this be so in default of evidence to the contrary, such marriage must be taken to have subsisted throughout the period which covered the conception and birth of the plaintiff's two sisters. These sisters would thus be co-heirs with the plaintiff of their father's property. It is true that their claim as such is statute barred, but the expiration of the period of limitation would accrue for the benefit of the defendants in the action (the now appellants), and not for the benefit of the plaintiff (the now respondent). In their Lordships' opinion the proper conclusion on the assumption that the *Nikah* marriage took place as alleged, was in favour of a *Muta* marriage having also taken place, and of the legitimacy of the plaintiff's sisters, in which case the plaintiff was entitled to one-third only of what she has recovered under the order of the High Court. In their Lordships' opinion the case should be remitted to the High Court to be dealt with on this footing; the order must be varied in this respect, with liberty to either party to apply to the High Court to vary the order as to costs; and there should be no costs of this appeal which has in part succeeded and in part failed. And they will humbly advise His Majesty accordingly.

T. A. R.

*Appeal party allowed.
Case remanded.*

Solicitors for Appellants — Pyke, Parroth & Co.

Solicitors for Respondent — Barrow, Rogers & Nevill.

**** A. I. R. 1914 Privy Council.**
(FROM ALLAHABAD)

11th March, 1914.

LORDS SHAW AND SUMNER, SIR JOHN
EDGE AND MR. AMEER ALI.
Batuk Nath—Decree-holder-Appellant
v.

Mt. Munni Dei and others—Judgment-
debtors-Respondents.

**** Limitation Act, Art. 179 (2)—Application for execution beyond 3 years of High Court decree is barred where Privy Council's dismissal was for want of prosecution of appeal, as it is not a final decree or order under Rule V of Orders in Council of 15th June, 1853.**

Under Rule 5 of the Order in Council of the 13th of June, 1853, where within a fixed time, the appellant or his agent has not taken effectual steps for the prosecution of the appeal, the appeal stands dismissed without further order.

Article 179, Clause 2 of Schedule II does not apply as such a dismissal for non-prosecution is not the final decree of an appellate Court from which a period of limitation should be reckoned in support of an execution application.

The execution application made more than three years after the decree of the High Court, is barred. [P. 66, C. 1.]

DeGruyther and J. M. Parikh—for Appellant.

E. Richards and B. Dube—for Respts.

Sir John Edge:—This is an appeal from a decree, dated the 4th June, 1910, of the High Court of Judicature at Allahabad, which dismissed an appeal by the appellant here from a decree of the Subordinate Judge of Agra, dated the 8th September, 1903, dismissing an application which had been made on the 2nd October, 1907, to the Court of the Subordinate Judge by Babu Batuk Nath for the execution of a decree of the 29th March, 1898.

The decree of the 29th March, 1893, had been made by the then Subordinate Judge of Agra in favour of one Sheo Narain in a suit which had been brought by him under the Transfer of Property Act, 1882, for sale of certain immoveable property. By that decree it was ordered that if Sheo Narain should fail to pay a prior mortgage-debt within five months from the 29th March, 1893, his suit should stand dismissed with costs. From that decree of the 29th March, 1898, an appeal was brought to the High Court of Judicature at Allahabad. That appeal was dismissed by the High Court by its decree

of the 12th February, 1900, but in dismissing the appeal the High Court extended the time for payment of the prior mortgage-debt to the 4th August, 1900. It has not been alleged or proved that any certified copy of the decree of the 29th March, 1893, was registered within the meaning of Article 179 of the second schedule of the Indian Limitation Act, 1877. From the decree of the 12th February, 1900, of the High Court an appeal to His Majesty in Council was brought. On the 15th December, 1904, the appeal to His Majesty in Council stood dismissed for non-prosecution under Rule V of the Order in Council of the 13th of June, 1853, without further order.

On the 26th September, 1901, Sheo Narain had assigned his decree of the 29th March, 1893, to Babu Batuk Nath. During the pendency of the appeal to His Majesty in Council some orders had been made by the Court of the Subordinate Judge of Agra extending the time for the payment of the prior mortgage-debt, but the last application for an extension of time for the payment of the prior mortgage-debt which was made to his Court was dismissed by the then Subordinate Judge of Agra by his order of the 20th March, 1902, and on the 7th June, 1902, the Subordinate Judge dismissed an application for a review of his order of the 20th March, 1902.

In making his decree of the 8th September, 1908, dismissing the application of the 2nd October, 1907, the Subordinate Judge held that the period of limitation which was applicable to the case ran from the dismissal for want of prosecution of the appeal to His Majesty in Council, that is to say, from the 15th December, 1904, and consequently that the application for execution had been made within time; he doubtless was under the impression that the appeal had been dismissed by an order of His Majesty in Council made in the appeal. The Subordinate Judge dismissed the application on the ground that the terms as to the payment of the prior mortgage debt imposed by the decree of the 29th March, 1898, not having been complied with within the extended time, the suit by the terms of that decree had stood dismissed. The attention of the learned Judges of the High Court does not appear to have been

drawn to the question of limitation; they dismissed the appeal to their Court on the ground upon which the application had been dismissed by the Subordinate Judge.

It appears to their Lordships that the application of the 2nd October, 1907, was made after the period of limitation, prescribed for such an application by Article 179 of the second schedule of the Indian Limitation Act, 1877, had expired and that the application should, in accordance with Section 4 of that Act, have been dismissed, unless the dismissal of the 15th December, 1904, for want of prosecution of the appeal to His Majesty in Council was by a final decree or order of His Majesty in Council made in the appeal. There was, however, no order of His Majesty in Council dismissing the appeal, nor was it necessary that any such order should be made in the appeal. Under Rule V of the Order in Council of the 13th June, 1853, the appellant or his agent not having taken effectual steps for the prosecution of the appeal the appeal stood dismissed without further order.

As their Lordships hold that the application of the 2nd October, 1907, was barred by limitation, and should on that ground have been dismissed, they do not consider it necessary to express any opinion on the grounds upon which the High Court made the decree which is under appeal. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of this appeal.

T. A. R.

Appeal dismissed.

Solicitor for Appellant—E. Dalgado.

Solicitors for Respondents—16 and 17—Barrow Rogers and Nevill.

A. I. R. 1914 Privy Council.

(FROM ALLAHABAD).

7th April, 1914.

LORD MOULTON, SIR JOHN EDGE AND
MR. AMEER ALI.

Chandri Abdul Majid—Judgment-debtor-Appellant

v.

Jawahir Lal and others—Decree-holders-Respondents.

(a) *Limitation Act, (1877), Sch. 2, Arts 180 and 179—Order by P. C. dismissing appeal for non-prosecution—Art. 180 does not apply—*

Application for final decree for sale—Time is 3 years from High Courts preliminary decree and not 12 years from dismissal of appeal by P.C. for non-prosecution.

An order of Privy Council dismissing an appeal for want of prosecution does not deal judicially with the matter of the suit and can in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognises authoritatively that the appellant has not complied with the conditions under which the appeal was open to him, and that therefore he is in the same position as if he has not appealed at all.

[P. 67, C. 1.]

In such a case, the period of limitation for an application to make absolute a preliminary decree for sale in a mortgage suit under Section 89, Transfer of Property Act, (IV of 1882) is not twelve years under Article 180 of Schedule II of the Limitation Act but three years under Article 179 from the order of the High Court which is final as it has not merged into the order of the Privy Council, because the appeal to the Privy Council was dismissed for want of prosecution.

[P. 67, C. 1.]

(b) *Civil P. C., (1908)—Scope—It is not retrospective and an application under S. 89, T. P. Act, once barred is not revived by the provisions therein.*

The application for enforcing the order nisi for sale of mortgaged properties having been barred before the passing of the Civil Procedure Code of 1908 under which the proceedings were purported to be made, no provisions of the Civil Procedure Code 1908, could operate to revive it.

[P. 67, C. 1.]

G. R. Lowndes—for Appellant.

DeGruyther and B. Dube—for Respts.

Lord Moulton:—In this case the relevant facts necessary and sufficient to determine their Lordships' decision on the appeal are very simple and are undisputed.

The appellant is in the position of mortgagor and the respondents of mortgagees under a mortgage, dated the 3rd September, 1868. In 1889 a suit was commenced before the Subordinate Judge of Allahabad to enforce that mortgage, and on the 12th May, 1890, a decree was passed by him for the sale of the property unless payment was made on or before the 12th August, 1890. An appeal was brought from that decree to the High Court, and, on the 8th April, 1893, that appeal was dismissed and the decree of the Subordinate Judge confirmed. The mortgagor obtained leave to appeal to this Board, but did not prosecute his appeal, and on the 13th May, 1901, the appeal was dismissed for want of prosecution.

The present appeal relates to an application to the Subordinate Judge, dated the 11th June, 1909, for an order absolute

to sell the mortgaged properties; in other words, for an order directing enforcement of the order *nisi* which had been confirmed by the decision of the High Court of the 8th April, 1893. It is not necessary to go into the particulars of this application because their Lordships are of opinion that any such application was barred by the Statute of Limitation, Article 179, at the expiry of three years from the date of the decree, and therefore before the passing of the Code of Civil Procedure of 1908 under which the present proceedings purported to be taken, and their Lordships have no doubt whatever that, inasmuch as the right to enforce the decree had once been barred, no provisions of the Code of Civil Procedure, 1908, operate to revive it.

The chief matter of argument before this Board was a contention that the decree which it is sought to enforce had been constructively turned into a decree of His Majesty in Council and assigned to the date of the 13th May, 1901, by virtue of the dismissal of the appeal for want of prosecution on that date, and that therefore the period of limitation was twelve years from the 13th May, 1901, by virtue of Article 180 of the Indian Limitation Act. Their Lordships see no foundation for this contention, which appears to have been the basis of the decision of the Courts below. The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all. To put it shortly, the only decree for sale that exists is the decree, dated the 8th April, 1893, and that is a decree of the High Court of Allahabad. The operation of this decree has never been stayed, and there is no decree of His Majesty in Council in which it has become merged. The period of limitation applying to the enforcement of it at all material times was therefore a period of three years. The respondents' right is therefore barred by limitation.

Their Lordships will therefore humbly advise His Majesty that this appeal should

be allowed, and that the application of the 11th June, 1909, should be dismissed and that the respondents should pay the costs of that application and of the appeal to the High Court as well as of this appeal.

T. A. R.

Appeal allowed.

Solicitors for Appellant—Douglas Grant.
Solicitors for Respondent No. 1—Barrow Rogers and Neville.

*** * A. I. R. 1914 Privy Council.**
(FROM CALCUTTA).

25th March, 1914.

LORDS DUNEDIN AND MOULTON, SIR
JOHN EDGE AND MR. AMEER ALI.

Harendra Lal Roy Chowdhuri—Appellant

v.

Sm. Havidasi Debi and others—Respondents.

* (a) *Jurisdiction—Territorial jurisdiction—Erroneous decision that Court has jurisdiction to entertain a suit does not bind non parties—Civil P. C. S. 11.*

In a suit on mortgage, filed in the High Court at Calcutta, it was held that property situated in Calcutta was included in the mortgage and that the Court had jurisdiction.

Held, that no such decision, if erroneous could extend the jurisdiction of a Court of limited territorial jurisdiction, and therefore the validity of the decree was open to challenge by persons who had not been parties to the proceedings.

[P. 69, C. 2.]

* (b) *Civil P. C., S. 11—Non-parties are not bound by decision.*

In a mortgage-suit, the description of a certain parcel in question was directed to be amended.

Held, that the direction even if it was effective between the parties to the suit could not affect persons who were not parties, and whose title was of earlier date or render valid the registration of the mortgage-deed if such persons could maintain their contentions relating thereto, *viz.*, that the deed was not duly registered. It was difficult, indeed, to see how the direction to amend, the description of the parcel, which formed part of the decree, came within the scope of the suit which was in no respect a suit for rectification.

[P. 69, C. 2.]

(c) *Deed—Mortgage—bond—House number and Street name given not applying to any property in existence—Property described by metes and bounds, not belonging to mortgagor—Mistake not proved—Entry of the house must be held to be fictitious to the knowledge of the parties.*

Where a mortgage-bond purported to mortgage a certain property which it described as No. 25 Guru Das Street, Calcutta but in fact there was no such property lying within the metes and bounds set out in the deed did not belong to the mortgagor at the date of the mortgage-bond.

Held, that it was open to the mortgagee to prove that there was a clerical or other error in

that description and the entry was not a fictitious one but he having failed to prove any such mistake the entry must be deemed to be fictitious to the knowledge of the parties. [P. 71, C. 1.]

(d) *Registration-deed—Description of houses in towns for registration—Proper description is by the street in which they are situate and the number which they bear in that street.*

The proper description of houses in towns for the purpose of registration is by the street in which they are situated and the number which they bear in that street. [P. 70, C. 1.]

(e) *Notice—Agent not inquiring if the mortgagor had any interest in a particular property mortgaged—Knowledge to be imputed to the principal (mortgagee) that the entry of that property in the deed was fictitious.*

Considering that he who was acting on behalf of the mortgagee took no steps to ascertain if the mortgagor had any title in the particular property mortgaged it pointed to the knowledge of the mortgagee that the entry was a fictitious one. [P. 70, C. 2.]

(f) *Burden of proof—Evidence Act, S. 101.*

The defendants having proved that the house which purported to be mortgaged did not exist, and that the property contained in the metes and bounds mentioned in the deed was property of strangers in which the mortgagor had not and never had any interest the burden was upon the plaintiff to show that the entry of the property was not a fictitious entry. [P. 70, C. 2 & P. 71, C. 1.]

Obiter giving the name of the street and a door number, which does not apply to any existing house in a mortgage-deed may be sufficient to preclude any rectification of the deed.

(g) *Registration Act, S. 28—The properties comprised in a deed of mortgage being all situated outside the limits of Calcutta, except for a portion which did not belong to the mortgagor, and which neither the mortgagee nor the mortgagor intended to be included in the mortgage—Such fictitious entry does not entitle the deed to be registered in Calcutta—It was also a fraud practised on the registration Law and a registration obtained by fraud is not valid.*

The properties comprised in a deed of mortgage were all situated outside the limits of Calcutta, except for a portion which did not belong to the mortgagor and which neither the mortgagor nor the mortgagee intended to be included in the mortgage.

Held, such a fictitious entry confers no jurisdiction upon the Calcutta Registrar's office to register it. Also the insertion of such a fictitious entry for purposes of getting the deed registered in Calcutta was a fraud practised on the Registration Law and a deed registered by fraud is not validly registered. [P. 71, C. 2.]

** (h) *Jurisdiction (Ordinary Original Civil) of the Calcutta High Court, Cl. 12, Letters Patent—Suit on a mortgage—Properties comprised in the mortgage being all situated outside Calcutta except for a portion which neither belonged to the mortgagor, nor was intended by the parties, to be a part of the mortgaged property—The Calcutta High Court has no jurisdiction to entertain the suit—Letters Patent (Cal.), Cl. 12,*

The Calcutta High Court in its Ordinary Original Civil jurisdiction, has no jurisdiction to entertain a suit on a mortgage, where all the properties comprised in the deed of mortgage are situated outside the limits of Calcutta except for one which neither belonged to the mortgagor nor was intended by the parties to be a part of the mortgaged properties. No such fictitious item inserted to give a colourable appearance of the deed relating to property in Calcutta when in reality no such property existed, could bring the deed within the limited jurisdiction of the Court. [P. 71, C. 2.]

** (i) *Evidence—Relevancy—Question whether wrong description of property in deed was due to mistake—Fact that similar description in other transactions was held to be a mistake is not relevant.*

On the issue if a particular item of property comprised in a deed of mortgage was by mistake wrongly described and so ought to be rectified, the fact that the mortgagor had mortgaged the same item to another mortgagee with the same description, which mortgagee compelled the mortgagor to consent for rectification is not relevant. [P. 71, C. 1.]

** (j) *Practice—Question of fact—Absence of evidence.*

A decision that there is no evidence to support a finding of fact is a decision of law. [P. 71, C. 1.]

DeGruyther and O'Gorman—for Appellant.

Upjohn and A. M. Dunne—for Respt.

Lord Moulton:—In this appeal the appellant Harendra Lal Roy Chowdhuri is the plaintiff in the action which was commenced by a plaint filed on the 16th September, 1905. The claim of the plaintiff was based on a mortgage-decree, dated 28th July, 1905, granted in a civil suit in the High Court of Judicature at Fort William in Bengal, acting under its ordinary original civil jurisdiction. That mortgage-decree purported to enforce an English mortgage of the 23rd September, 1895, executed by the *pro forma* defendant Mani Mohan Roy in favour of the plaintiff of certain properties, among which was an eight anna share of lands known as Mahal Gumokpota. The object of the present suit is to obtain a declaration that the female defendant Haridasi Debi acquired no right of ownership or possession in that property by virtue of an auction-purchase made by her on the 23rd November, 1904. It is therefore brought to establish the title of the plaintiff to those lands as being lands charged under his mortgage and subject to the decree free from any prior right of the female defendant.

The transactions between the parties to the suit and the litigation arising therefrom

are of the most complex character, and raise questions of considerable difficulty, both in fact and law. But the respondents, at the hearing of the appeal, raised a preliminary point which goes to the root of the action, namely, that the plaintiff shows no title enabling him to bring such an action. They submit that the mortgage of the 23rd September, 1895, was not duly registered, and, further, that the Court which granted the mortgage-decree of the 28th July, 1905, had no jurisdiction to entertain the suit in which that decree was granted. If these contentions of the respondents can be sustained, it is clear that the plaintiff's action must fail, and that the decision of the High Court dismissing this action must be affirmed.

The facts of the case, so far as they are relevant to this preliminary point, are as follows. On 23rd September, 1895, Mani Mohan Roy purported to mortgage to the plaintiff various properties set out in a Schedule to the mortgage-deed for the purpose of securing an account current of Mani Mohan Roy with the plaintiff, and freeing him from certain liabilities. The properties in question as set out in the schedule are 28 in all, the first being the eight anna share of Mahal Gumokpota, to which the suit relates, and the last property described as follows:—

"All that two-storied brick-built messuage, tenement, or dwelling house with the piece or parcel of rent-free land on part whereof the same is erected and built, containing by estimation $\frac{1}{2}$ cottah, situate, lying and being premises No. 25, Guru Das Street, Jorasanko, in the town of Calcutta, and butted and bounded on the north, by a private lane of Ashutosh Dey; on the east, by the dwelling-house of Nandakumari Dasi; on the south by the dwelling house of Khetra Mohan Dhara; and on the west, by a Government drain."

This last property is the only one which purports to be in the town of Calcutta. All the other properties enumerated in the schedule are outside Calcutta and outside the local limits of the ordinary original jurisdiction of the High Court of Judicature at Fort William in Bengal.

This mortgage was presented for registration at the Calcutta Registry office by the executant Mani Mohan Roy on the day of its execution and registered by the Sub-Registrar in the usual manner. In 1903 the plaintiff brought a suit on this mortgage-deed against the defendant Mani Mohan Roy and others in the High Court of Judicature at Fort William in

Bengal, and on the 28th July, 1905, obtained the ordinary decree for sale. Neither of the two effective defendants in the present suit were parties to such action. The parties to the suit upon the mortgage seem to have set up that there was a mistake in the description of parcel 28, and that the words "Ashutosh Dey Lane" should be substituted for "Guru Das Street." The learned Judge accepted this contention and accordingly held that property situate in Calcutta was included in the mortgage and that he had jurisdiction. No such decision, if erroneous, could extend the jurisdiction of a Court of limited territorial jurisdiction, and therefore the validity of this decree is open to challenge by the present defendants, who were no parties to proceedings. Similarly, the direction of the said Judge that the description of the parcel in question should be amended (even if it was effective between the parties to that suit) cannot affect the present defendants, whose title is of earlier date, or render valid the registration if they can maintain their contentions relating thereto. It is difficult, indeed, to see how the direction to amend the description of the parcel which formed part of the decree came within the scope of the suit, which was in no respect a suit for rectification.

The defendant Mani Mohan Roy did not appear in the present suit. The female defendant Haridasi Debi, and the third defendant Hem Chandra Bose (who was interested in the suit as claiming an interest in the property through her), appeared and filed written statements clearly putting in issue the existence of the property No. 28 above set forth, and alleging that no portion of the property mortgaged by the mortgage-bond lay within the jurisdiction of the High Court of Judicature at Fort William in Bengal in its original jurisdiction or within the jurisdiction of the Sub-Registrar of the Calcutta Registry. Accordingly they contended that the alleged mortgage was not legally registered, and that the decree was given by a Court which had no jurisdiction to entertain a suit on the mortgage-bond in question.

At the hearing of the action the plaintiff called no evidence with regard to the parcel No. 28. Neither the plaintiff nor Mani Mohan Roy went into the box to

give evidence as to there being any mistake in description of the parcels. On the other hand, the defendants proved that there is not, and has never been any such property as No. 25, Guru Das Street, in Calcutta and they further proved that the property lying within the metes and bounds set out in parcel 28 did not belong to Mani Mohan at the date of the mortgage-bond, and that on the contrary he had not then and never has had any interest in the property within those metes and bounds. Such property has always, belonged to parties wholly unconnected with the parties in this suit and has been continuously registered in their names in the Calcutta Registry.

It follows therefore that No. 25, Guru Das Street, which is the parcel No. 28, was a non-existing property. It was no doubt open to the plaintiff to prove that there was a clerical or other error in the description of the property, and that in fact an existing property situate in Calcutta was intended by both parties to be mortgaged and to be described in parcel No. 28. But there is not a particle of evidence that such was the case. Neither the mortgagor Mani Mohan nor the mortgagee the plaintiff Harendra Lal Roy went into the box to give evidence as to this. As to Mani Mohan their Lordships cannot see how it would have been possible for him to give any such evidence because it would amount to stating that he intended that the deed should purport to mortgage an existing property in which he had not and knew that he had not any property or interest whatever. This being so their Lordships, in the absence of evidence, decline to accept an unsupported suggestion of counsel that the description of the property mortgaged as No. 25, Guru Das Street, was inserted by mistake. It must be remembered that the proper description of houses in towns for the purpose of registration is by the street in which they are situated, and the number which they bear in that street, so that the description No. 25, Guru Das Street, is that to which one should primarily look.

It may well be that the above is sufficient to preclude any rectification of the mortgage-bond. If the mortgagor intended it to stand, as it appears in the deed, there is no question of mutual mistake. But if the case of the mortgagee be con-

sidered, there is similarly no ground whatever for thinking that there was any mistake. The only witness whose evidence has any bearing on the point is Harakumar Chakravarti. He was clerk to Messrs. Sen and Co., who were the plaintiff's attorneys at the time, and drew up the mortgage, and he witnessed its execution by Mani Mohan and the admission of that execution before the Sub-Registrar. He does not refer to the matter in his examination-in-chief, but in cross-examination he says that he did not himself enquire about the house No. 25, Guru Das Street, but sent the broker to ascertain the boundaries of the house which shows that it was the above description of the house that he relied on, and that it was a house so described that was intended by the parties to be included in the mortgage. But with regard to this house he makes some very serious admissions. He says:—

"I do know whether there is such a house as No. 25, Guru Das Street. I did not keep any original title-deed respecting this property. I did not see any original title-deed regarding 25, Guru Das Street, before or after the mortgage."

Considering that he was acting on behalf of the mortgagee, the fact that he took no steps to ascertain whether the mortgagor had any title in this property points strongly to the knowledge of the mortgagee that the entry was a fictitious one. Coupling this with the fact that neither this witness nor the plaintiff gave any evidence as to there being any mistake or as to their knowledge and belief as to the existence of the property at the date of the mortgage (although these issues were plainly raised in the pleadings of both the defendants), their Lordships decline to accept the suggestion that there was a mistake on the part of the mortgagee any more than that there was a mistake on the part of the mortgagor. The fact that neither the mortgagee nor the mortgagor gave evidence in support of the suggestion of a mistake has great weight with their Lordships. The defendants having proved that the house which purported to be mortgaged did not exist, and that the property contained in the metes and bounds mentioned in parcel 28 was property of strangers in which the mortgagor had not and never had any interest had proved all that was necessary to throw upon the plaintiff the burden of showing that the

entry of this parcel was not a fictitious entry. He might have done this by showing mistake or otherwise, but he did not do so, but abstained from giving any evidence whatever on the subject, although both he and Mani Mohan were available to give evidence, and were the persons who could establish the facts of the case. Taking all these matters into consideration, their Lordships can come to no other conclusion than that parcel No. 28 was to the knowledge of the parties to the deed a fictitious entry probably designed to give to the deed the appearance of relating to property situated in Calcutta and therefore within the jurisdiction of the Sub-Registrar and the Calcutta High Court, so that registration could be obtained and actions brought in Calcutta.

It was strongly contended before their Lordships that the Subordinate Judge had found that it was a mistake, and that the High Court had accepted his finding so that the principle of two concurrent findings of fact would apply.

But their Lordships are of opinion that the principle of concurrent findings of fact does not apply to such a case as the present inasmuch as it is a case of no evidence, and according to the well-known principles of our law a decision that there is no evidence to support a finding is a decision of law. The issue is that the existing description of the parcels was inserted by mistake. A mistake means that parties intending to do one thing have by unintentional error done something else. There is no evidence whatever here that the error was unintentional or indeed that there was any error at all, and their Lordships are therefore free to set aside the finding without in any way departing from their practice regarding concurrent findings of fact.

It is perhaps necessary in this connection to point out that the document upon which the Subordinate Judge based his finding of mistake was not evidence between the parties nor relevant to the issue. In some other mortgage-deed of later date and to other mortgagees, Mani Mohan had apparently purported to mortgage the same property by the same description, and had been compelled by the mortgagees to consent to rectification. Such a fact was wholly irrelevant, and it

is extraordinary that it should have been allowed to be proved at the trial.

It remains to consider the effect of their Lordships' finding. It may be looked at in two ways. In the first place the property, 25, Guru Das Street, purporting to be mortgaged, is a non-existing property, and therefore no portion of the property mortgaged is situated in Calcutta. The deed, therefore, could not be registered there, nor had the Court of ordinary original jurisdiction of Fort William in Bengal any jurisdiction to entertain the suit upon the mortgage-bond, and its decree is of no validity. The plaintiff therefore has no title to maintain the suit and it must be dismissed.

But the point may be put in another way upon broader grounds. Their Lordships hold that this parcel is in fact a fictitious entry, and represents no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security. Such an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact exists, is a fraud on the Registration Law, and no registration obtained by means thereof is valid. To hold otherwise would amount to saying that mortgages relating solely to land in other parts of the Presidency could be validly registered by the Sub-Registrar at Calcutta if the parties merely took the precaution to add as a last parcel, Government House, Calcutta, or any similar item. The same considerations apply to the question of jurisdiction of the High Court at Fort William in Bengal in its ordinary original jurisdiction. No such fictitious item inserted to give a colourable appearance of the deed relating to property in Calcutta when in reality such is not the case, could bring the deed within the limited jurisdiction of the Court. For the same reasons, therefore, as have been stated above, the plaintiff's case fails.

Their Lordships therefore will humbly advise His Majesty that this appeal should be dismissed with costs.

T. S. N. *Appeal dismissed.*

Solicitors for Appellant—T. L. Wilson and Co.

Solicitors for Respondents—Watkins and Hunter.

A. I. R. 1914 Privy Council.
(FROM CALCUTTA)

26th May, 1914.

LORDS MOULTON AND PARKER, SIR JOHN
EDGE AND MR. AMEER ALI.*Jalandhar Thakur*—Appellant

v.

Jharula Das—Respondent.

Privy Council Appeal No. 68 of 1913.

(a) *Civil P C*, (1882), S. 244—*Suit to set aside decree and sale thereunder on ground of fraud—S. 244 does not apply.*

Section 244 of the Civil Procedure Code (1882) could not apply to a suit, to set aside a decree and a sale in execution of that decree, on the ground that they had been obtained by fraud. [P. 73, C. 1.]

(b) *Civil P. C.*, S. 11—*Suit by Hindu widow for setting aside decree and sale thereunder on ground of fraud—Dismissal of suit does not bar suit by reversioner after widow's death for declaration of his title to the property.*

The dismissal of a suit by a Hindu widow for setting aside on the ground of fraud, a decree and a sale thereunder, does not preclude a suit by the reversioner after the widow's death, for a declaration that he was entitled to the property, the subject matter of the previous sale. [P. 74, C. 1.]

(c) *Limitation Act*, Art. 124—*Appropriation of income of shebait by stranger who was not competent to hold the office of Shebait does not affect the title to the office and suit by Shebait for declaration that he is entitled to receive the income is not within Art. 124—Every time the stranger appropriates he commits an actionable wrong, in respect of which an action lies—Lim. Act, S. 23—Hindu Law, Rel. Endowment.*The respondent had taken and was appropriating to his own use a particular share of the net income from the offerings made to a temple in virtue of his purchase of the same in Court auction on the 8th February, 1892, in execution of a mortgage decree against the last *Shebait*. The *Shebaitship* was a hereditary office and could be held only by Brahmin Pandas. The present *Shebait* in January, 1910, (i.e.,) ten years after the death of the last *Shebait* which occurred in 1900, brought a suit among other things for a declaration that he was entitled to that share of income which the respondent was appropriating. It was contended that the suit was barred under Article 124.*Held*, that the respondent not being a Brahmin Panda could not hold the office, that the right to the office did not arise from or depend upon the receipt of the share of the income and that his appropriation did not constitute him *Shebait* for the time being or affect the title to that office in any way. In these circumstances the suit was not one for possession of an hereditary office and Article 124 did not apply and that every appropriation was a fresh actionable wrong on which a suit could be maintained. [P. 74, Cols. 1 & 2.]*A. M. Dunne* and *B. Dube*—for Appellants.*G. R. Lowndes*—for Respondent.**Sir John Edge:** The appellants here are the heirs and legal representatives of one Bhaiaji Thakur, now dead, who was the plaintiff in the suit in which this appeal has arisen. Bhaiaji Thakur was a *shebait* of an ancient temple of Mahadeoji, called the Singheswar Temple, which is situate in Mouza Gouripur, otherwise Singheswarpur, in the District of Bhagalpur. Bhaiaji Thakur became a *shebait* of the temple, on the death in 1900 of one *Musammât Grihimoni* who was the widow of one Pratipal Thakur. Pratipal Thakur had been a *shebait* of the temple, and until his death had been, as such *shebait*, entitled to receive a $3\frac{1}{2}$ annas share of the daily surplus income from the offerings to, after defraying the expenses of, the temple; on his death his widow *Musammât Grihimoni*, succeeded to his *shebaitship* and accordingly became entitled to receive the same share of the daily surplus income from the offerings. The right to such $3\frac{1}{2}$ annas share came to Bhaiaji Thakur on the death of *Musammât Grihimoni* as the next reversionary heir under the Hindu Law to the *shebaitship*. The *shebait*s of the Temple are Brahmin Pandas who, as *shebait*s have to perform, or to provide for the performance of, the sacred worship or *puja* of the Deity at the Temple. Jharula Das, who is the defendant to the suit and the respondent to this appeal, is by caste a Beldar, and, as a Beldar, is not competent to perform, or to provide for the performance of, the sacred *puja* to the Deity at the Temple, and consequently was incapable of acquiring or holding the office of a *shebait*.In 1880, Jharula Das obtained a decree for money on a mortgage which had been granted by *Musammât Grihimoni*. In execution of that decree Jharula Das in 1891 caused the $3\frac{1}{2}$ annas share of *Musammât Grihimoni* to be put up for sale and at the sale on the 20th November, 1891 purchased the share. Jharula Das on the 8th February, 1892, obtained a certificate of sale in which the property which he had purchased was described as the

"Income of the Muth of Sri Singheswartharaji Mahadeo, which Muth is situated in Mauzah Singheswarthan, pergunnah, Nisankhipur Khurha, to the extent of 3 annas 6 pies, which belongs to the judgment-debtor, within the jurisdiction of

the Madhepura Sub-Registry Office, Bhagalpur Collectorate."

In November 1892, *Musammât* Grihimoni and Bhaijaji Thakur brought a suit against Jharula Das to have the sale to him of the 20th November, 1891 set aside. That suit was by the permission of the Court withdrawn by *Musammât* Grihimoni and Bhaijaji Thakur with liberty to bring a fresh suit on the same cause of action. In 1895, *Musammât* Grihimoni brought a fresh suit against Jharula Das to have the sale set aside on the ground that the decree and the order for sale had been fraudulently obtained by Jharula Das. The suit of 1895 was dismissed on appeal on the ground that her proper remedy was by an application under Section 244 of the Code of Civil Procedure, 1882, to dispute the validity of the sale, and consequently that the suit did not lie. Their Lordships fail to understand how Section 244 of the Code of Civil Procedure, 1882, could have applied to a suit which in effect was brought to set aside the decree of 1880, and the order for sale, on the ground that Jharula Das had obtained them by fraud.

Musammât Grihimoni died in 1900. On the 25th January, 1910, Bhaijaji Thakur brought the present suit in the Court of the Subordinate Judge of Bhagalpur and claimed possession of certain lands and mesne profits and a declaration that he was entitled to receive the $3\frac{1}{2}$ annas share of the net income from the offerings to the Temple with other reliefs. In his written statement the defendant Jharula Das alleged, so far as is now material, that Bhaijaji Thakur was bound by the decree which dismissed *Musammât* Grihimoni's suit of 1895, and that the decision in that suit operated on the principle of *res judicata*, to defeat the claim in respect of the $3\frac{1}{2}$ annas share. At the trial, a defence that the suit was barred by limitation was raised. As to the defence of *res judicata* the Subordinate Judge rightly held that the decision in *Musammât* Grihimoni's suit of 1895 did not operate as a bar to this suit. On the question of limitation, the Subordinate Judge found that Jharula Das had not purchased the right of shebaitship, but the Subordinate Judge held that the appropriation by Jharula Das of the $3\frac{1}{2}$ annas share of the surplus income from the offerings to the Temple practi-

cally amounted to a dispossession, and treating Bhaijaji Thakur's suit, so far as it related to the $3\frac{1}{2}$ annas share, as a suit for the establishment of his right to shebaitship and for recovery of the profits of that office, and having found that *Musammât* Grihimoni had died in 1900, he applied Article 124 of the First Schedule of the Indian Limitation Act, 1908, and decided that the suit had been brought within time. On the 3rd April, 1911, the Subordinate Judge gave to the appellants here, who had been brought on the record as the representatives of Bhaijaji Thakur, who had died, a decree for possession of the land claimed, for possession of the $3\frac{1}{2}$ annas share of the net income from the offerings to the Temple, and for mesne profits subsequent to the institution of the suit. From that decree of the Subordinate Judge, Jharula Das appealed to the High Court of Judicature at Fort William in Bengal. The High Court in the appeal upheld the decision of the Subordinate Judge so far as it related to the land claimed and to mesne profits in respect of the wrongful possession by Jharula Das of that land, and to that extent by their decree affirmed the decree of the Subordinate Judge. With that part of the decree of the High Court this appeal is not concerned. Those learned Judges of the High Court considering that Article 124 of First Schedule of the Indian Limitation Act, 1908, applied to the claim in respect of the $3\frac{1}{2}$ annas share of the surplus daily income from the offerings to the Temple, and being of opinion that the 12 years' period of limitation provided by that Article began to run in 1892, when Jharula Das first began to appropriate to his own use the income of the $3\frac{1}{2}$ annas share, decided that the claim in respect of the $3\frac{1}{2}$ annas share was barred by limitation. They also held that the claim to the share was barred by the principle of *res judicata*, arriving at that decision apparently on the view that the dismissal of *Musammât* Grihimoni's suit of 1895 extinguished the claim of the shebait to the $3\frac{1}{2}$ annas share. Accordingly, the High Court by its decree of the 12th March, 1912, set aside the decree of the Subordinate Judge so far as it related to the claim to the $3\frac{1}{2}$ annas share and the profits of that share. From that decree of the High Court the present appellants have appealed to His Majesty in Council.

The defendant Jharula Das has not appealed.

On the hearing of this appeal, the contention that the dismissal of *Musammatt Grihimoni's* suit of 1895 extinguished the right of the *shebait*s to the $3\frac{1}{2}$ annas share, and that the claim in respect of that share was *res judicata* was very properly abandoned; it was untenable. But it was strongly contended on behalf of the respondent that the claim in respect of that share came within Article 124 of the First Schedule of the Indian Limitation Act, 1908, and was barred by limitation. It is not necessary for their Lordships to consider whether, if that Article applied, the 12 years' period of limitation began to run in 1892 or on the death of *Musammatt Grihimoni* in 1900, as they are of opinion that Article 124 of the First Schedule of the Indian Limitation Act, 1908, does not apply in this case. *Bhaiaji Thakur's* suit was not a suit for possession of an hereditary office. Jharula Das had not taken possession of an hereditary office. The office of *shebait* of the temple was an hereditary office which could not be held by any one who was not a Brahmin panda, Jharula Das not a Brahmin panda, he was of an inferior caste, and was not competent to hold the office of *shebait* of the temple or to provide for the performance of the duties of that office. The appropriation from time to time by Jharula Das of the income derivable from the $3\frac{1}{2}$ annas share did not deprive *Musammatt Grihimoni* or, after her death, *Bhaiaji Thakur*, of the possession of the office of *shebait*, although that income was receivable by them in right of the *shebait*ship. The right to the office of *shebait* did not arise from, or depend upon the receipt of a share of the surplus daily income from the offerings to the temple, although the right to receive daily a share of the net income from the offerings to the temple was attached to and dependent on the possession of the right to the *shebait*ship. Unless the *shebait*s received their share of the daily net income from the offerings, it does not appear how the ministrations of the temple could be provided for. By adversely taking and appropriating to his own use a share of the surplus daily income from the offerings Jharula Das acquired no title and no right to a share of that income. On each occasion upon

which Jharula Das received and wrongfully appropriated to his own use a share of the income to which the *shebait* was entitled, Jharula Das committed a fresh actionable wrong in respect of which a suit could be brought against him by the *shebait*. But it did not constitute him the *shebait* for the time being or affect in any way the title to the office.

The appellants here are entitled to have the decree of the High Court so far as it relates to the $3\frac{1}{2}$ -annas share, and to the costs in the High Court and in the Court of the Subordinate Judge varied by setting aside that part of the decree of the High Court which relates to the $3\frac{1}{2}$ -annas share and those costs, and by giving them a decree for all the costs in the High Court and in the Court of the Subordinate Judge, and a declaration that *Bhaiaji Thakur* was at the date of the suit entitled to the $3\frac{1}{2}$ annas share of the net daily income of the offerings to the temple. Their Lordships will advise His Majesty accordingly.

The respondent must pay the costs of the appeal.

T. S. N.

Appeal allowed.

Solicitors for Appellants — Barrow, Rogers and Nevill.

Solicitors for Respondent — T. L. Wilson and Co.

*** A. I. R. 1914 Privy Council.**
(FROM CALCUTTA.)

6th April, 1914.

LORD MOULTON, SIR JOHN EDGE
AND MR. AMEER ALI.

John King and Company, Limited—
Appellants

v.

The Chairman of the Municipal Commissioners of Howrah and others—Respondents.

Privy Council Appeal No. 65 of 1913.

Bengal Appeal No. 96 of 1910.

** Deed—Construction—A road which was south of a Khal or Nullah stated to be southern boundary—The entire bed of the nullah and not only half of it must be deemed to be included within the boundary.*

The title-deed of the plaintiffs showed that the plaintiffs or their predecessors-in-title had been ever since 1855, the owners of a parcel of land bounded on the south by a road called the Telhalghat Road which lay to the south of a khal or Nullah.

The Privy Council was asked to interpret this boundary of the property as meaning that the property of the plaintiffs' predecessors-in-title only went up to the central line of the Nullah.

Held, that, as to do that would be to reject the description of the parcels which was to be found consistently in the deeds and to make those deeds convey land marked out by different metes and bounds from that which there appeared, that interpretation should not be adopted. It was possible that by allowing certain portion from time to time to be added to the Telkalghat Road for the purposes of improving that road, the plaintiffs and their predecessors-in-title might have parted with the property or at all events with the right of possession of those strips of land; but as none of those formed part of that which was claimed in the action, the plaintiff's ejectment suit, which was in time, should be decreed. [P. 75, C. 2.]

Lord Moulton :—This is an appeal in an action brought by John King and Co., Limited, to obtain a declaration of their title to certain lands mainly consisting of a Khal, or Nullah, along the Telkalghat Road, Howrah, and for ejectment of the defendants therefrom and for damages or mesne profits.

The course of the case has been rather a singular one. The plaintiffs at the trial proved a clear title to the lands for over fifty years by a succession of duly registered conveyance, mortgages, reconveyances and other title-deeds, and also proved that during that period they leased portions of the land by leases that themselves were registered. Their Lordships indeed think that they might go so far as to say that, after the rather complex devolution which took place within that long period had been carefully explained by Counsel for the appellants, it became evident that it was scarcely possible to conceive of a clearer title by deeds than that which was proved by the plaintiffs. They also proved that they had not been dispossessed by the defendants until a period well within the period of limitation, and that therefore the Statute of Limitations did not apply.

The Judge at the trial, who went into the evidence with very great care, found in favour of the plaintiffs on all points. An appeal was brought to the High Court. It would seem from the judgment of that Court that the Judges pronouncing it took a most extraordinary view of the plaintiffs' case, ignored entirely the clear title to the land which the plaintiffs had proved and expressly held that they came into Court without title

deeds. They therefore treated the case as though it was one in which the Court had nothing relevant before them but the conduct of the parties to decide which of them was entitled to the land.

Their Lordships are entirely unable to understand the grounds on which the High Court rejected the title of the plaintiffs on their title-deeds nor can they understand what the learned Judges meant by saying that the plaintiffs have no title-deeds. The consequence of this error on the part of the Judges of the High Court is that they never considered the real questions in the case and their judgment gives to their Lordships no assistance.

The title-deeds of the plaintiffs (none of which are impugned) which are all duly registered, show that the plaintiff's or their predecessors-in-title have been ever since 1855, the owners of a parcel of land bounded on the south by the Telkalghat Road. Now it may very well be that the Telkalghat Road was not at that date the broad metalled road that it is now but it is certain that it lay to the south of a Khal or Nullah, the bed of which with its banks is the principal subject in dispute in the present action.

Their Lordships have been asked to interpret this boundary of the property as meaning that the property of the plaintiff's predecessors-in-title only went up to the central line of the Nullah which lies to the north of the Telkalghat Road itself. To do that would be to reject the description of the parcels which is to be found consistently in the deeds and to make these deeds convey land marked out by different metes and bounds from that which there appears. Their Lordships decline so to do. They think that it is possible that by allowing certain portions from time to time to be added to the Telkalghat Road for the purposes of improving that road, the plaintiffs and their predecessors-in-title may have parted with the property or at all events with the right of possession of those strips of land; but none of those form part of that which is claimed in this action. So far as that which is claimed in this action is concerned, they have title and they have had possession. They have been dispossessed from this, but they brought this action in due time, and their action of ejectment must succeed and this appeal

must be allowed. Their Lordships are quite satisfied both with the reasons and the conclusions of the Judge at the trial and they will humbly advise His Majesty that the decree of the High Court which is appealed against should be set aside and that the decree of the Subordinate Judge should be restored and affirmed. The respondents must pay the costs of the appeal to the High Court and to this Board.

S. A. R.

*Appeal allowed.***A. I. R. 1914 Privy Council.**

(FROM CALCUTTA.)

22nd July, 1914.

LORDS MOULTON, AND PARKER OF
WADDINGTON, SIR JOHN EDGE AND
MR. AMEER ALI.

Ekyadeshwar Singh—Appellant

v.

*Musammat Janeshwari Bahusin—Res-
pondent.*

On Appeal from the High Court at
Calcutta.

(a) *Grants—Babuana and Sohag Grants.*
—Grants differ from absolute grants and are
subject to family custom.

*Babuana grants and Sohag grants differ essen-
tially in their nature from absolute grants and
are subject to the Kulachar under which they
are authorised and in accordance with which they
are made.* [P. 77, C. 2.]

(b) *Custom—Family custom, Darbhanga
Raj is an impartible Raj the right of suc-
cession to the gaddi and to the property of the
Raj Reasat, is by the male of lineal primo-
geniture—Younger sons are entitled to main-
tenance—The wife of the younger son gets by a
sohag grant the usufruct of a portion of the
Raj Reasat—Females are excluded from succes-
sion—babuana Grants are made to a male,
while sohag grants are made to a female and
in each case, the grant is for the benefit of the
male descendants of the grantee—Immoveable
properties purchased from Babuana properties
are accretions to babuana properties.*

The Darbhanga Raj is an ancient and impartible Raj and by the *Kulachar* or family custom, "the right of succession to the gaddi and to the property of the Raj Reasat, descends according to the rule of lineal primogeniture. Each younger son in the family is entitled by way of a *babuana* grant to a portion of the Raj Reasat for the maintenance of himself and his male descendants in the male line, and the wife of a younger son of a Maharaja of Darbhanga gets by way of a *Sohag* grant the usufruct of a portion of the Raj Reasat for the maintenance of herself and her male descendants in the male line. In each case the property

village or villages, continue to form part of the Raj Reasat from which it is never separated and the property granted reverts to the Maharaja of Darbhanga for the time being on the failure of male descendants in the male line of the grantee. Females, widows and daughters and descendants of daughter are excluded from the succession to *babuana* and *Sohag* properties. *Babuana* and *sohag* lands, descend in the family of Darbhanga not to one male heir only but to all the existing male heirs in the male line of the grantee as co-parceners. The custom by which females are excluded from the succession to *babuana* and *sohag* properties apply also to cases where there has been a partition among co-parceners. Immoveable properties which were acquired from the income and profits of the *babuana* properties are to be considered as accretions to *babuana* properties. [P. 77, C. 2.]

The custom governing the succession to and the inheritance of *sohag* property is the same as the custom governing the succession to and inheritance of *Babuana* property. But a *Babuana* grant is made to a male, while a *Sohag* grant is made to a female. In the one case the grant is made for the benefit of the grantee and his male descendants, in the other case, the grant is for the benefit of the grantee and her male descendants in the male line. [P. 80, C. 1.]

(c) *Hindu Law—Applicability—Darbhanga family is governed by the Mithila School.*

The family of the Darbhanga Raj are Hindus, and except in so far as customs of the family and its branches exist and apply, the members of the family are governed by the Mithila School of Hindu Law which so far as it applies to this case, may be taken as following the *Mithakshara* of the Benares School. [P. 77, C. 2.]

(d) *Words:—"auras Putra Poutradik"—Meaning will be modified by family custom as to succession.*

The expression "*auras Putra Poutradik*" are not always words of general inheritance which would include females as well as male heirs, but the meaning of the expression will be modified by any family custom as to succession. (7 Cal. 304 Distinguished). [P. 80, C. 2.]

(e) *Hindu Law—Joint family—Right to partition is necessary incident of the family property.*

The right under the *Mitakshara*, of co-parceners in Hindu ancestral property to have the joint property, partitioned is unquestionable, unless the property is held under a grant or is subject to a custom which expressly or impliedly prohibits any partition of the property, which would have the effect of defeating the object of the grant or the custom.

(f) *Evidence Act, S. 32, sub-S. 4—Statement of a deceased person as to family custom, made after controversy is not admissible.*

Evidence oral or documentary as to the statements of a deceased person as to the custom in a family is not admissible, if it appears that such statements were made after a controversy as to the custom had arisen. [P. 80, C. 1.]

(g) *Hindu Law—Partition puts an end to co-parcenary rights.*

A separation between members of a joint Hindu family followed by a partition between them of the

ancestral property which would not put an end to their co-parcenary rights in the property is unknown to the Law. [P. 79, C. 1.]

(h) *Hindu Law—Family custom—General usage of custom is not defeated by its not being followed in a solitary instance in the family.*

A well-established custom in the family cannot be defeated by the fact that in one case the custom was not enforced.

E. Richards and *A. M. Dunne*—for Appellant.

DeGruyther and *K. Brown*—for Respondent.

Sir John Edge:—The suit in which this appeal to His Majesty in Council has arisen was brought on the 20th December, 1906, in the Court of the Subordinate Judge of Bhagalpur, by Babu Ekradeshwar Singh, who is the appellant here, against *Musammât Janeshwari Bahuasîn*, who is the widow of the plaintiff's younger brother, Babu Janeswar Singh. The plaintiff and his brother were sons of Netreshwar Singh, who was younger son of Maharaja Rudar Singh of Darbhanga.

The plaintiff claimed a declaration that he was entitled to the properties in suit which were owned by and in the possession of his deceased brother, a decree for possession of those properties, for mesne profits, and other reliefs. The property claimed consisted of the share which the plaintiff's brother had obtained on a partition between them of immovable property which had been granted by a *babuana* grant to their father, of immoveable property which had been granted by a *sohag* grant to their mother, of immoveable property alleged to be accretions to the *babuana* property and of accumulations. The plaintiff's claim was based on an alleged custom in the family of the Darbhanga Raj by which widows and other females were excluded from all rights to the possession of lands held under *babuana* grants or *sohag* grants. It was alleged by the plaintiffs that the properties which had been purchased by his father and by his brother had been purchased with profits which had been derived from the *babuana* property and were to be treated as accretions to that property. The defendant who was in possession, denied the existence of any such custom and by her written statement put the plaintiff to proof of his title to possession.

The Darbhanga Raj is an ancient and impartible Raj, and by the *kulachar*, or family custom, the right of succession to

the *gaddi* and to the properties of the Raj Reasat descends according to the rule of lineal primogeniture. The younger sons of a Maharaja of Darbhanga are styled Babus, and by the *Kulachar* each younger son is entitled by way of a *babuana* grant to a portion of the Raj Reasat for the maintenance of himself and his male descendants in the male line, and the wife of a younger son of a Maharaja of Darbhanga gets, by way of a *sohag* grant, the usufruct of a portion of the Raj Reasat for the maintenance of herself and her male descendants in the male line.

In each case the property, village or villages, granted, continues to form part of the Raj Reasat, from which it is never separated; it is entered in the Government Revenue Registers under the name of the Maharaja for the time being of Darbhanga as the proprietor, and the property so granted reverts to the Maharaja for the time being of Darbhanga on the failure of male descendants in the male line of the grantee. *Babuana* grants and *sohag* grants differ essentially in their nature from absolute grants, and are subject to the *kulachar* under which they are authorised and in accordance with which they are made. The family of the Darbhanga Raj are Hindus, and, except in so far as customs of the family and its branches exist and apply, the members of the family are governed by the Mithila School of Hindu law, which, so far as it applies to this case, may be taken as following the Mitakshara of the Benares school.

Maharaja Rudar Singh of Darbhanga, by a *babuana* grant granted to his son Babu Netreshwar Singh by way of maintenance as *babuana*, the *dehat milkiat* appertaining to pergunnah Nisankhpur Kusha together with *dasturat malikana*. That grant has not been put in evidence in this suit, but the fact that the grant was made is proved by a sanad, dated 7th Phagun Badi 1257, which was granted by Maharaja Rudar Singh to his eldest son Maheshwar Singh. That Sanad was registered in the registry of Mozuffarpur on the 13th February, 1850. The sanad shows that *babuana* grants had also been made by Maharaja Rudar Singh to two other of his younger sons, and contains the following directions:—

"The said Maharaja Kumar Babus shall continue in possession of the said pergunnahs, and the Government revenue, which shall be due on ac-

count thereof, will be paid by them to you, and you will pay the same to the Government along with the Government revenue of the Raj. The said Babus shall live in a style befitting the positions of Babus, and you shall treat them according to your sense of propriety as a Raja, and in a manner befitting their position as Babus."

On the death of Maharaja Rudar Singh his eldest son Maheshwar Singh succeeded to the *gaddi* and the Raj Reasat, and became Maharaja of Darbhanga. Maharaja Maheshwar Singh by a sanad, dated 6th Aghan Sudi 1259 *Fasli* (A. D. 1852), granted to Bahusin Sohagin Mauzah Madhapur as a *sohag* gift. As translated in this record the sanad contains the following clause:—"You and your sons and grandsons, etc., shall cultivate or get cultivated the *Mouzah* aforesaid, and enjoy the usufruct thereof yourself." Bahusin Sohagin was the wife of Babu Nitreshwar Singh and the mother of the plaintiff, and of his late brother. She is referred to in the record as *Musammât* Netrobati Bahusin.

The plaintiff's mother died in 1879. His father died in 1883, when the plaintiff and his brother were minors. Until the separation of the brothers and a partition between them, the effect of which will later be considered, the plaintiff and his brother were co-parceners in the *babuana* property, which according to Hindu law, was in their joint possession ancestral property, subject, however, to such family custom as applied to it. Similarly, the *sohag* property was ancestral property in which, at the time of the separation and partition, the plaintiff and his brother were co-parceners. The plaintiff came of age in 1888, and was put in possession of the *babuana* property and the *sohag* property as manager for the family consisting of himself and his brother. The younger brother came of age in 1896. Soon after the younger brother came of age disputes arose between the brothers, they separated and each brought a suit against the other to obtain partition of the property in which they were co-parceners. Decrees for partition were made, and in 1900 the property was partitioned between the brothers. The younger brother died without issue on the 18th April, 1906, leaving surviving him his wife, who is the defendant to this suit. On her husband's death she took possession of the property which he held at the time of his death. Her right to the posses-

sion of that property is disputed in this suit on the ground that by a family custom she as a widow, although entitled to money maintenance, was excluded from any right to the possession of that property.

The *kulachar* or family custom under which the plaintiff claimed is thus described by him in his plaint:—

"1. That the family, to which the plaintiff and the defendant's husband belong, has held from time immemorial the properties known as Raj Reasat of Darbhanga, and constituting an impartible Raj, and is governed by the *kulachar*, or family custom, in the matter of succession and inheritance as hereinafter mentioned.

2. That by such *kulachar* and family custom, females, either widows or daughters and heirs in the female line, are altogether excluded from succession.

3. That so far as the said Raj Reasat is concerned, the same descends according to the rule of lineal primogeniture on the eldest son of the last holder, the other sons obtaining portions of the Raj for maintenance and support by way of *babuana* grants.

4. That in the event of the last holder of the said Raj dying without male issue, natural or adopted, his younger brother, or, in the absence of brother, his nearest agnate, according to the rule of lineal primogeniture, succeeds to the said Raj to the exclusion of widows and other females.

5. That the incidents of the said *babuana* properties are, that the name of the Maharaja Bahadur of Darbhanga for the time being stands recorded in the Government Register as the proprietor of the *mouzahs* comprised in the said properties, and it remains a part and parcel of the said Raj, and the Babus holding the said properties pay the Government revenue and other public demands payable in respect of the said *mouzahs* to the said Maharaja who pays the same to Government; and that the said Babus and their male heirs in the male line remain in possession and enjoyment of the said *mouzahs*, and that on the extinction of the heirs male of the grantees in the male line, the said *mouzahs* together with all acquisitions, moveable and immovable, made from the income thereof, revert to the said Raj.

6. That by virtue of the *kulachar* aforesaid and the incidents of the said *babuana* grants, on the death of any male descendant in the male line of any Babu or younger son of the said Raj family to whom a *babuana* grant as aforesaid has been made, without male issue, natural or adopted, his nearest agnate among the other male descendants in the male line of the said grantee succeeds to his share in the said *babuana* grant together with all accretions thereto as aforesaid.

7. That in accordance with the custom of the family of Raj Darbhanga usufructs of some village or villages out of the Raj properties are granted to females of the family on the occasion of their marriages or other ceremonies. The rule of succession and other incidents connected therewith are the same as that of *babuana*, the vil-

lages granted to them descend to males of their body in unbroken male line ; and on the extinction of male issue the said village or villages revert to the Raj."

The plaintiff put forward the following as an explanation of the separation and partition between him and his brother:—

"16. That after the husband of the defendant attained majority, and in consequence of disagreement between him and the plaintiff, they separated and divided amongst themselves the major portion of the aforesaid properties and *sohag* property merely for the sake of convenience, and undisturbed enjoyment of usufruct without prejudice to their co-parcenary rights as junior members of the Raj Darbhanga family; but they being of junior branch of the Darbhanga Raj family, their status as co-parceners in the Darbhanga Raj family did not come to an end, nor did such partition in any way affect or alter the nature and incident of their tenure of the said grant

17. That the husband of the defendant died on the 18th April, 1906 without any issue, and leaving plaintiff his full brother, and the defendant his widow.

18. That according to the *kulachar* or family custom referred to above obtaining in the Darbhanga Raj family, including the junior branches thereof, the defendant has no right or title to the estate left by her husband; and the plaintiff as the surviving male heir in the family of the grantee Maharaja-kumar Babu Nitreshwar Singh and also as a co-parcener in the Darbhanga Raj family, is entitled to succeed to and to the possession of the estate left by the husband of the defendant, representing his share of the said grant and accretions thereto; and that the defendant is only entitled to suitable maintenance out of the same; and that she is not entitled to succeed to and possess the said estates, properties and effects as is falsely pretended by her."

It may be observed that a separation between members of a joint Hindu family followed by a partition between them of the ancestral property which would not put an end to their co-parcenary rights in the property is unknown to the law. As the plaintiff was a party to the suits in which the decrees under which the partition was effected were made he is not in a position to deny as against his brother's widow that partition did in fact take place. He may, however, have intended by his plaint to represent that the partition between him and his brother had not the ordinary legal effect of a partition between co-parceners, and that the custom of the Darbhanga Raj family which would exclude widows from the succession when the members of a branch remained joint, would equally apply to exclude the widow of a separated member of a branch.

The Subordinate Judge found, as the fact was, that there had been complete separation between the brothers in food, worship, and estate, and consequently that at the time of the death of the younger brother in 1906, the plaintiff had no co-parcenary interest in any of the property in suit. The correctness of that finding has not been questioned in this appeal. The Subordinate Judge also found that there is a valid custom in the junior branches of the family of the Darbhanga Raj, including the family to which the parties to the suit belong, that widows do not inherit *babuana* properties, and that the succession and inheritance in the case of *sohag* grants are governed by the custom which governs the succession and inheritance in the case of *babuana* grants, and he held that notwithstanding that there had been complete separation between the brothers the custom applied. He gave the plaintiff a decree for possession of some of the immovable properties which the plaintiff claimed, for certain moveable property, and for mesne profits. From that decree the defendant, the respondent here, appealed to the High Court of Judicature at Fort William in Bengal. The learned Judges before whom the appeal came found that although the subjects of *babuana* and *sohag* grants would, on the failure of male heirs in the male line of the grantee, revert to the Maharaja of Darbhanga for the time being, the plaintiff had failed to prove any custom by which the widow of a childless and separated Babu was not entitled during the continuance of a *babuana* or *sohag* grant to hold for a Hindu widow's interest the property which her separated husband had held under a *babuana* or *sohag* grant, and, consequently, applying the rules of the ordinary Hindu law, those learned Judges decided that the plaintiff had failed to prove as against the defendant that he was entitled to the possession of any of the property in suit, and by their decree set aside the decree of the Subordinate Judge and dismissed the suit. From that decree this appeal to His Majesty in Council has been brought.

Some statements deposed to by witnesses who were called, and some of the documents which were put in were not admissible as evidence in this suit. It seems to have been overlooked at a period of the suit that evidence, oral or

documentary, as to statements of a deceased person as to the custom in a family is not admissible if it appears that such statements were made after a controversy as to the custom had arisen. There is, however, abundant evidence to prove what was the custom in this family of the Darbhanga Raj which applied to *babuana* grants and *sohag* grants and to accretions to *babuana* immoveable property.

Their Lordships are of opinion that the Subordinate Judge arrived at a correct conclusion on the evidence that the custom governing the succession to and the inheritance of *sohag* property is the same as the custom governing the succession to and the inheritance of *babuana* property. In the High Court, Mr. Justice Richardson held that *sohag* property is similar in its nature and incidents to *babuana* property, and is governed by similar considerations, and Mr. Justice Sharfuddin did not dissent from that view. Their Lordships find that, except that a *babuana* grant is made to a male while a *sohag* grant is made to a female, there is no difference so far as the right to succession to the property is concerned between a *babuana* grant and its incidents and a *sohag* grant and its incidents. In the one case the grant is made for the benefit of the grantee and his male descendants in the male line, in the other case the grant is for the benefit of the grantee and her male descendants in the male line; in each case, females, widows and daughters and the descendants of daughters are by the custom applying to such grants excluded from the succession, and on the failure of such male descendants in the male line the property granted reverts to the Maharaja of Darbhanga for the time being. The general evidence as to custom upon which their Lordships have found that widows are excluded from the succession to *babuana* and *sohag* properties, includes and is strongly supported by instances in this family of Darbhanga of widows, who would otherwise have been entitled to a Hindu widow's interest, having been excluded from, or not having claimed, possession on the death of their husbands.

In some of the *babuana sanads* which are in evidence in this suit the words which have been regarded in the Court below as words of limitation are in the vernacular *auras putra poutradik*. As to

those sanads, Mr. Justice Sharfuddin in his judgment in this case said:—

"From the copies of sanads (Exhibits 20 A, 20 B., 20 C, 20 D, and 20 E) it is clear that female children and daughters' sons were excluded from the inheritance of the *babuana* properties. The expression used in the sanads are *auras putra poutradik*, which means sons born of the loins. I take it to mean that so long as there is one descendant of this description, the properties granted are not to revert to the Raj."

That construction is consistent with the evidence as to those *babuana* grants to which their Lordships attach importance, and their Lordships are unable to regard them as words of general inheritance which would include female as well as male heirs. In this connection the attention of their Lordships has been drawn to the judgment of this Board in *Ram Lal Mookerjee v. The Secretary of State* (1) in which it was held that in Bengal in a gift to a man the vernacular words *putra poutradi krame* would be read as words of general inheritance, and would include female as well as male heirs where by law the estate would descend to such heirs. *Babuana* grants could not be made under the ordinary Hindu Law, but they are authorised by the custom which excludes females from the succession. Their Lordships must regard the words *auras putra poutradik* as used in these sanads as words of limitation consistent with the custom, and not as words of general inheritance.

Their Lordships having found that under the custom which applies to the branches of this family widows are excluded from all right to succeed to *babuana* property or to *sohag* property, it is necessary to consider whether that custom, which has been proved to apply where the members of the branch remain joint, can, without evidence that it has been applied where the members of a branch have separated in food, worship, and estate, be held to exclude the widow of a childless and separated member from a Hindu widow's interest in the *babuana* and *sohag* properties which had been held by her husband as his separate property. In this case it is clear that until the brothers separated the *babuana* and *sohag* properties were held by them, subject to the terms of the grants and the custom, as

(1) [1881] 7 Cal. 304=8 I. A. 46=10 C.L.R. 349=5 Jur. 327=4 Sar. 225 (P. C.).

joint ancestral property in which their rights were those of co-parceners.

The right under the Mitakshara of co-parceners in Hindu ancestral property to have the joint property partitioned is now unquestionable unless the property is held under a grant, or is subject to a custom, which expressly or impliedly prohibited any partition of the property which would have the effect of defeating the object of the grant or the custom. It has been contended that there can be no partition of *babuana* or of *sohag* property in this family of Darbhanga, and that to allow that *babuana* and *sohag* property could be partitioned would be to frustrate the very object with which *babuana* grants and *sohag* grants have been made and the very object with which the custom in the family of the Darbhanga Raj authorised the making of such grants by the Maharaja for the time being of Darbhanga that object being to provide by a grant of lands suitable maintenance, having regard to the position of the family, for the grantee, and his or her male descendants in the male line, and to relieve the Maharaja of Darbhanga from the possibility of having from time to time to provide for such descendants' maintenance by gifts of money. In support of the contention that there can be no partition of *babuana* property reference has been made to the judgment of this Board in *Durgadut Singh v. Rameshwar Singh* (2)

That case related to a *babuana* grant in this family of Darbhanga. Their Lordships in that case stated that those who for the time being are entitled to be maintained out of *babuana* property "cannot have it divided amongst them by proceedings in the nature of partition." The statement referred to, although doubtless correct, cannot be regarded as an authority binding in this appeal, as it was made upon a concession as to facts which were not proved, and which certainly would not be proved by the evidence in this suit. The concession which was made by counsel in that case was that lands which had been granted to Kirkat Singh by a *babuana* grant descended to the eldest male heir of the grantee to be held, or managed by the person to whom they descended for the mainten-

ance of the family. The evidence in this suit proves that *babuana* and *sohag* lands descend in the family of Darbhanga, not to one male heir only, but to all the existing male heirs in the male line of the grantee as co-parceners.

Apart from the general evidence that females are excluded from the succession to *babuana* and *sohag* properties there is little evidence, and that apparently merely evidence of opinion, that the rule as to the exclusion of females from a succession applies where there has been a partition. It is probable that there have been few instances in this family of Darbhanga of a separation in food, worship and estate in which this question as to the right of a female to succeed to *babuana* or *sohag* property could have arisen. It is doubtful that with the exception of the present case and the case of *Musammatt Ghanlata* who was the widow of Babu Ghansham Singh, there has been any case in which a separated and sonless member of a branch of the Darbhanga family had a wife who survived him.

Musammatt Ghanlata's case occurred in a branch which descended from Maharaja Madho Singh, from whom the present Maharaja of Darbhanga descended through Maharaja Rudar Singh who made the *babuana* grant in this case. Ramput Singh, who was a younger son of Maharaja Madho Singh, had a *babuana* grant, he had six sons, one of whom was Dharamput. Dharamput had by his wife Dharamlata a son Ghansham Singh, who had by his wife *Musammatt Ghanlata* two daughters but no son. Ghansham's daughters married and had male issue. Ghansham Singh separated from his uncles and cousins and obtained possession of his father's sixth share of the *babuana* property of that branch. On Ghansham Singh's death his widow *Musammatt Ghanlata* entered into possession of his one-sixth share of the *babuana* property as hers by right of inheritance, and in the presence and with the knowledge of the agnates of her deceased husband she was registered as the proprietor of that one-sixth share, and held possession of it for 16 years until she died. A few days before she died *Musammatt Ghanlata* executed an *ekrarnama* in which she stated that by custom she had no title to the share, and alleged that

(2) [1909] 36 Cal. 943=4 I. C. 2=36 I.A. 176 (P.C.).

she had been permitted to hold possession of it merely by way of maintenance.

It is obvious that she executed the *ekrarnama* as a compromise to secure, if possible, 400 *bighas* of the lands for her grandsons, who were sons of her daughters. No explanation satisfactory to their Lordships of the reason why *Musammatt* Ghanlata was allowed to take and to hold possession of her late husband's one-sixth share, and why the custom was not enforced in her case, has been forthcoming. It is possible that, owing to the novelty of the position, the parties who were concerned were in some doubt as to their rights under the custom. However that may have been, their Lordships are of opinion that a well-established custom in the family cannot be defeated by the fact that in one case the custom was not enforced. The subsequent history of Ghansham's one-sixth share, so far as it is known to their Lordships, is inexplicable.

Their Lordships hold that the custom in this family of the Darbhanga Raj by which females are excluded from the succession to *babuana* property and to *sohag* property applies in this case notwithstanding the separation and the partition which was effected by the plaintiff and his late brother, and consequently that on the death of his brother the plaintiff became entitled to the possession and enjoyment of the *babuana* property and of the *sohag* property which his brother held at the time of his death.

Their Lordships agree with the Subordinate Judge, for the reasons stated by him, that the immoveable properties which were acquired from the income and profits of the *babuana* properties are to be considered as accretions to the *babuana* properties, and they hold that the plaintiff became, on his brother's death, entitled to the possession and enjoyment of those immoveable properties. Their Lordships are not satisfied that the plaintiff proved a title to the possession of any of the movable property or accumulations which he claimed. The defendant was and is entitled to money maintenance, and as no substantial offer of adequate maintenance was made, their Lordships consider that the claim for mesne profits should be disallowed.

Their Lordships will humbly advise His Majesty that the decree of the High Court should be set aside; that the appellant should have a decree for the possession of the immoveable properties in suit excepting Nos. 15, 19 and 21 of Schedule 3, and No. 10 of Schedule 4 (A), and that in other respects the decree of the Subordinate Judge should be varied by dismissing the suit; that it be declared that the respondent is entitled to be paid monthly during her life, unless the property reverts in the meanwhile to the Maharaja of Darbhanga for the time being, future maintenance at the rate of Rs. 15,000 per annum, such maintenance to be a charge upon the immoveable properties which the appellant will recover by the order in this appeal; and that no costs be allowed to either side in the High Court or in the Court of the Subordinate Judge.

Their Lordships consider that if the appellant and his brother had not effected a partition, this litigation might have been avoided. No costs of this appeal will be allowed to either side.

T. R. R.

Appeal allowed.

Solicitors for Appellant—W. W. Box and Co.

Solicitors for Respondent—T. L. Wilson and Co.

A. I. R. 1914 Privy Council.

(FROM CALCUTTA)

20th July, 1914.

LORDS DUNEDIN, ATKINSON AND SUMNER, SIR JOHN EDGE AND MR. AMEER ALI.

(Maharaja) Surja Kanta Acharjya—Appellant

v.

Sarat Chandra Roy Chowdhuri—Respondent.

(a) *Privy Council — Practice—Concurrent findings of fact.*

With reference to the concurrent findings on an issue of fact, the well established rule of this Board is not to consider what conclusion they would have arrived at if the matter was for the first time before them but whether it has been established that the Courts below are clearly wrong. *Allen v. Quebec Warehouse Company*. (1887) 12 A. C. 101=56 L. T. 30=56 L. J. (P. C.) 6.

[P. 84, C. 2.]

(b) *Acquiescence—Proceedings of public officials—Their determinations of disputes are*

of high value—Long acquiescence and subsequent transactions on their basis though not estoppels, cannot be disturbed without clear proof of error—Evidence Act, S. 35.

In proceedings before the Deputy Collector in reference to boundary disputes between neighbouring owners, boundaries were fixed and the *Thak* prepared and settlement made on its basis.

These proceedings are in truth determinations of public officials of the matters in dispute, all the parties interested being given an opportunity of making their claims, raising their objections and producing their evidence. Though parties are not estopped by the decisions arrived at, they are obviously of high authority and when acquiesced in by all the parties interested for a length of time and made the basis of important transactions, should not be disturbed except upon clearest proof that they are erroneous. [P. 85, C. 2.]

(c) *Bengal Land Revenue Sales Act (XI of 1859)*—Limitation against purchaser runs from date of sale—Sale free from encumbrances.

Under the provisions of Act XI of 1859, revenue sales are held free of encumbrances and as the right by adverse possession claimed is at its best only an encumbrance on the Mahal purchased limitation runs against the purchaser only from the date of the sale and if the suit is within 12 years from that date it is not barred. [P. 83, C. 2.]

DeGruyther and *B. Dube*—for Appellant.

E. Richards and *A. M. Dunne*—for Respondent.

Lord Atkinson :—This is an appeal from the judgment and decree, dated the 22nd May, 1903, of the High Court of Judicature at Fort William in Bengal, affirming a judgment and decree of the 27th March, 1905, of the Court of the Subordinate Judge of Rajshahye.

The action out of which this appeal arises was brought by the respondent as purchaser at a sale held under Act II of 1859 in consequence of the non-payment by the owner of the Government assessment of the Kas Mahal Shyampur Paharpur situate within the Pergunna Ser Shahabad, and No. 218 on the *Touzi* of the Maldah Collectorate, to recover possession of about 2,720 *bighas* of the *Mouzah* Nij Shampur alleged to form portion of the said *Khas Mahal*, the possession of which was withheld by the appellant, and for damages for mesne profits and further relief. This sale was held on the 14th of January, 1891, and duly confirmed on the 15th of March following.

The appellant relied upon two defences—First, that the land, the possession of which was sought to be recovered, styled for convenience the land in dispute, did not form any portion of the *mahal* so pur-

chased by the respondent, and, secondly that even if it did, the appellant and those through whom he claimed had held possession of this land adversely to all persons having claims upon it continuously since, if not before, the year 1859 up to the present time, and that the respondent's claim was therefore barred by the Limitation Act. In anticipation of this second defence the respondent, in his plaint, alleged that this adverse possession, even if proved, was under the provisions of Act XI of 1859 only an incumbrance on the *mahal* purchased, that on sale this latter was vested in him free from all incumbrances, including the incumbrance thus created, and that consequently his right to recover possession was not barred by the Limitation Act.

It was admitted by Mr. DeGruyther, on behalf of the appellants, that on the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited, or rather, determined, and that under such a sale as that which took place in this case, what was sold was not the interest of the defaulting owner, but the interest of the Crown, subject to the payment of the Government assessment, and that therefore the time limited by the Limitation Act only commenced to run from the date of the sale, in this case the 14th January, 1891. If this be so, then, as the action was instituted on the 23rd December, 1902, the statutory period of 12 years had not elapsed before the latter date, and the claim of the respondent to recover was unaffected. This defence may be accordingly put aside. There remains the part and parcel question.

In order to appreciate the respective contentions of the parties litigant, and the rulings of the Courts below upon this question, it is necessary to refer shortly to the history of those properties of which the land in dispute is alleged to have formed part.

It was not, their Lordships think, disputed that at the time of the decennial settlement of Bengal, one Chandra Narayan Roy was the zemindar of the pergunnah Ser Shahabad, and that the permanent settlement of 1793 was made with him in respect of that pergunnah. Neither was it disputed that at the time of this settlement Chandra Narayan Roy improperly returned as *debottar* lands, i.e., lands devoted to religious purposes, and there-

fore unassessable to Government revenue, portion of eight *mouzahs* or villages forming portion of the pergunnah Sershabad. The Crown being misled by this untrue statement subsequently instituted proceedings under Regulation 2 of 1817 dealing with such matters, to deprive by way of resumption, Chandra Narayan Roy and his successor of the land so untruly described. The Crown represented by the Indian Government obtained a decree for resumption of this latter land on the 24th of December, 1834, which was on appeal confirmed by the Special Commissioner on the 18th of June, 1836. Possession of the misdescribed land having been thus obtained by the Government, they unified it and constituted it a *Khas Mahal*.

The main contention of the appellant has been that as Chandra Narayan Roy was the owner under the permanent settlement of the entire pergunnah of which the land so resumed formed part, the burden of proving that the land in dispute formed portion of the land so resumed rested upon the respondent, and that in so far as he failed to discharge that burden the lands in dispute must be taken to remain and be vested in the appellant, the successor-in-title to Chandra Narayan Roy, as his property. This contention, though in the main, in their Lordships' view sustainable enough, is in one respect mistaken, namely this, that it was competent for the Crown in the year 1859, when making the settlement under which the respondent in effect claims to have added to the resumed land, other land then belonging to it and made a grant of both combined. Such difficulty as the case presents arises altogether from one's inability to identify by metes and bounds the land actually resumed, and it is to this point the appellants' counsel have directed their lengthy and ingenious arguments.

Three attempts have been made to fix the boundaries of this land and to definitely ascertain its position and extent in 1838, in 1840, and in 1848 respectively. Both the Courts below have found that the last of the three, namely, that made in 1848, was so successful that the accuracy of the result then arrived at was not before them successfully impeached. It is embodied in the map of the survey of the village of Shyampur-Paharpur surveyed in April, 1848, a copy of which numbered Map 2 was given in evidence.

The conclusions of the Courts below on this point being concurrent findings on an issue of fact the well established rule of this Board in such cases is, as stated by Lord Herschell in *Allen v. Quebec Warehouse Co.* (1) this:—

"Their Lordships do not consider that the question they have to determine is what conclusion they would have arrived at if the matter had for the first time come before them, but whether it has been established that the judgments of the Courts below, were clearly wrong."

It is vital to the appellants' case that this should be shown on his behalf, for this reason that after the decree for resumption of the misdescribed *debottar* lands had been enforced, and the Government assessment upon them fixed, Chandra Narayan Roy declined to take the grant of them offered to him by way of settlement, and thereupon a lease or *Ijara* settlement of them was made to one Shib Chandra Chatterji for a term of 20 years from the 1st of May, 1838. On the expiration of this term, after some delay, a grant by way of final settlement of this *Khas Mahal*, was, on the 27th of September, 1859, made to Jogendra Narayan Roy, a younger son of Chandra Narayan Roy. By successive transfers made from time to time this *Mahal* ultimately became vested in Uday Chandra Bothra, the defaulting owner, upon whose failure to pay the Government revenue, it was, as already mentioned, sold to the respondent on the 14th of January, 1891.

Now the Subordinate Judge has found (p. 383) that the permanent settlement of this *Mahal* (*Towzi* No. 218) in September, 1859 "was undoubtedly made upon the *Thak* and Revenue Survey of 1847-1848." And the High Court have found as a fact (p. 410), that

"the settlement of 1859 was made on the basis of the survey map whether that map was right or wrong, and whether it differed from the *Tanabandi* of 1840 and the settlement of 1838 or not. That it was wrong there is not a particle of evidence to show. It was always acted upon, and must be taken to be the best evidence of what was settled in 1859."

It was contended before their Lordships, as before the Courts below, that on a comparison of this survey map of 1848, with the proceedings in the Court of the Collector of Maldah on the 18th of June, 1838, before Mr. Edward Latour, "in the matter of the settlement of *Khas*

(1) (1887) 12 A. C. 101=56 L. T. 30=56 L. J. (P.C.) 6.

Mahal Taraj Shyampur Paharpur decreed under Regulation 2, 1819," and the Rubokari dated the 11th March, 1840, of Mr. William Bell (Deputy Collector of the District of Maldah (p. 274, R.) and with the map prepared by him entitled *Simanabunai* map prepared by him, it would be found that the area of the land alleged to have been resumed according to the Revenue Survey was largely in excess of the 20,254 *bighas* which in the proceedings before Mr. Latour they are found to measure, that the survey was consequently plainly inaccurate, and the findings of both the Courts below as to its being unimpeachable were, therefore, clearly wrong.

This contention is dealt with in the Courts below, and especially by the High Court in their judgment at pages 410 and 411. The so-called map prepared by Mr. Bell is in truth no map at all. It is a picture containing lineal measurements, made in different directions, estimated in Rasis, from a peg identified as one of those placed by Mr. Latour. No superficial areas were measured of the contents ascertained. In the order made by Mr. Bell on the 11th of March, 1840, it is recited, amongst other things, that the boundaries of the *Khas Mahal* were taken by Mr. Latour by fixing pegs in certain places and measuring from these pegs in certain directions, but that several of these pegs had been swept away, that at the time of Mr. Latour's settlement the River Bhagirathi flowed below and to the west of a certain palm tree treated by Latour as a landmark for the purpose of his measurements, namely the Panchatara palm tree at Dhoka, that there was Majh Dearah to the west of this river, and to the west again of that Majh Dearah the River Ganges flowed, that all the lands of this Majh Dearah were diluviated, that the two rivers became united, and the former bed of the latter river became Dearah. The physical features of the *Khas Mahal* thus became altogether changed.

In addition, the question of this alleged excess in the survey was elaborately dealt with in the proceedings instituted in the Court of the Thakbast Deputy Collector of the district of Bhagalpur and Maldah in reference to disputes arising between the owners of the neighbouring *Mouza* of Sherpur Bhandar, and Ram Chandra Roy

and other, as owners of this *Mouza* Shyampur Parhapur touching the boundaries between these *mouzas*. In the order made by the Deputy Collector on the 11th May, 1848, the proceedings before Latour and Bell, respectively, are cited at length, the alleged excess is dealt with, and it is ordered that the Hadbast of the whole of this property in dispute should be made within the circuit of Shyampur Paharpur, that a perwana should be written to Syed Ata Hossein Peshkar, directing him to make the Hadbast thereof and that a copy of the proceedings shall be forwarded to the Superintendent of Thakbast for final orders with respect to the excess lands.

In pursuance of this order the case came before the Superintendent of Surveys for re-trial, and by his order, dated the 6th of March, 1849, reciting again at length the proceedings before Messrs. Latour and Bell, and stating the cause to which this excess was due it was ordered that the appellant's objections should be disallowed and that the lands which the Deputy Collector considered to be excess lands should be held to be intrinsically the land of Shyampur Paharpur Government *Khas Mahal* belonging to Chandra Chatterji, the respondent in that case, and that the *Thak* prepared by the said officer should be maintained and confirmed. These last proceedings, like those preceding them are in truth determinations by public officials of the matters in dispute, all the parties interested being given the opportunity of making their claims raising their objections, and producing their evidence. The parties to them are, no doubt, not estopped by the decisions arrived at, as they would be in regular proceedings in Courts of law, but these determinations are obviously of high authority, and when acquiesced in by all the parties interested for a length of time, and made the basis of important transactions, should not be disturbed unless upon the clearest proof that they are erroneous. Their Lordships have not found that the comparison of Bell's map with the Survey map is sufficient to lead them to the conclusion that the latter is, save possibly in one respect, erroneous, nor have they discovered anything in any of the proceedings subsequent to the year 1848 to lead them to think so. The bed of the Ganges is apparently included in the *mahal* according to the survey map,

but this does not form part of the lands in dispute, and if it belonged to the Crown, as it is contended it did, it would be vested in the purchaser by the settlement of the 27th September, 1859. The finding of both Courts that the survey formed the basis of the settlement has not been impeached, and their Lordships, on full consideration of all the evidence, find themselves unable to come to the conclusion that the other concurrent finding of fact, namely, that the survey map is accurate, was clearly wrong. They are, therefore, of opinion that the judgment and decree, appealed from should stand, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

T. A. R. *Appeal dismissed.*

Solicitors for Appellant—T. L. Wilson and Co.

Solicitors for Respondent—W. W. Box and Co.

A.I.R. 1914 Privy Council.

(FROM UPPER BURMA)

27th April, 1914.

LORDS MOULTON AND PARKER OF WADEINGTON, SIR JOHN EDGE AND MR. AMEER ALI.

Nga Lu Gale—Appellant

v.

Nga Po Than—Respondent.

Limitation Act, Art. 145—Oil-well mortgaged—Redemption suit is governed by 30 years period—Sale by mortgagor more than 12 years prior to suit for redemption bars redemption—Adverse possession.

Plaintiff mortgaged an oil-well in Burma in 1875 and also in 1879 for a further advance by *Parabaiik* document. The mortgagor (plaintiff) sued for redemption in 1908. The defendant contended that the second transaction was a sale.

Held that if the second transaction amounted to a sale the vendee was in adverse possession for over 12 years, and that if it was a mortgage the right to redeem accrued more than 30 years before suit and in either case the suit was barred.

Lowndes—for Appellant.

Respondent—Ex parte.

FACTS :—This was a suit for redemption of an oil-well mortgaged by the plaintiff's father to the defendant in 1875 for Rs. 500. The further sum of Rs. 200 was advanced by the defendant on the same security in 1879. This latter advance was evidenced by a *Parabaiik* document. The mortgagee deepened the well at his own cost. The mortgagor contended that this latter document created only a further charge, while the mortgagee contended that the transaction was a sale out and out.

The suit was filed in the District Court of Magwe. The defendant contended further that the well in suit was on State land and therefore the revenue Court had jurisdiction under Section 53 of the Upper Burma Land and Revenue Regulation to the exclusion of the Civil Courts. The District Court rejected the plea of want of jurisdiction and held that the *Parabaiik* document was a mortgage and not a sale. On appeal to the Court of the Judicial Commissioner it was held the suit was to establish an interest in the State land and was therefore not triable by a Civil Court. The mortgagor thereupon initiated proceedings in the Special Revenue Officer's Court which held that it had no jurisdiction as the well was not on state land. Thereupon the mortgagor moved the Judicial Commissioner to review and the Judicial Commissioner on review held that the defendant was bound to show that the mortgage was converted into a sale by the subsequent transaction. The mortgagee therefore appealed to His Majesty in Council.

Lord Moulton :—Their Lordships are of opinion, that, upon the evidence before the Judge at the trial, more especially the evidence of the witnesses called for the plaintiff, it was satisfactorily established that the second transaction was a sale. They are also of opinion that, even if the Court were of opinion that there was no reliable evidence as to the nature of the second transaction, so that the rights of the parties must be settled by the first transaction, the result of the action would be the same, inasmuch as in that case the Statute of Limitations would apply, because the plaintiff's right to redeem would have accrued more than 30 years before the action, and nothing was proved which would take the case out of the Statute. Their Lordships, therefore, agree with the decision of the learned Judge of first instance, and are of opinion that it ought to have been affirmed by the Judicial Commissioner, and they will humbly advise His Majesty that the decision of the Judicial Commissioner should be set aside with costs, and the decision of the first Court restored. The respondent must pay the costs of this appeal.

v. v. c.

Appeal allowed.

Solicitors for Appellant—Arnould and Son.

* *A. I. R. 1914 Privy Council.

(FROM MADRAS.)

8th June, 1914.

LORDS DUNEDIN AND MOULTON,
SIR JOHN EDGE AND MR. AMEER ALI.

Ravi Veeraraghavulu and others—Defendants-Appellants

v.

B. Venkata Narasimha Naidu—Plaintiff-Respondent.

Privy Council Appeal No. 92 of 1912.

(a) *Second Appeal—Madras Rent Recovery Act, Ss. 9 and 69—S. 372, C. P. C. (Act VIII of 1859)—Second appeal lies to the High Court from Order of District Judge affirming a decree of the Collector. Suit under Section 9 by landlord for enforcement of patta.*

Though Section 69 of the Madras Rent Recovery Act (VIII of 1865) provides only for one appeal from the Collector to the District Judge as the provisions of Section 372 of the Civil Procedure Code (Act VIII of 1859) the law then regulating the procedure in moffussil Courts recognised a special appeal to the Sudder Court from Subordinate Courts and under C. P. C. (Act XIV of 1882) an appeal lies to the High Court from the District Judge unless the right is taken away by legislation, and the uniform practice has been to prefer second appeals since the Act. A second appeal is competent in suits by a landlord for enforcing the acceptance of a *patta* under Section 9. (1910) 33 Mad. 177=6 I. C. 988=37 I. A. 110 (P. C.) referred to 26 M. 518=13 M. L. J. 296 approved.

(b) *Privy Council—Longstanding practice of permitting untenable second appeals would be upheld.*

Their Lordships would not interfere with a longstanding practice even if they thought there was an implied rule against second appeals lying from the decisions of the District Judge with respect to adjudications under an Act by the Collector.

(c) *Civil P. C., S. 100 (S., 584 C. P. C., 1882)—Interference by High Court.*

The competency of the High Court under, S. 584, C. P. C. (Act XIV of 1882) is confined to questions of law and procedure and a concurrent finding of fact cannot be set aside. (1891) 18 Cal. 23=17 I. A. 122=5 Sar. 560 (P. C.) approved.

DeGruyther and J. M. Parikh—for Appellants.

E. Richards and K. Brown—for Respondent.

Mr. Ameer Ali :—These consolidated appeals from certain decrees of the High Court of Madras arise out of a number of suits brought by the plaintiff-respondent in the Court of the Head Assistant Collector of the Bezwada division, under the

provisions of Section 9 of the Madras Rent Recovery Act (VIII of 1865). The object of all the actions was to enforce by legal process the acceptance by the defendants of the *pattas* or leases he had tendered to them.

The scope of the material sections of Madras Act VIII of 1865 was considered by their Lordships in *Parthusarathi Appa Row v. Chavandra Venkata Narasayya* (1), it is sufficient, therefore, to say in this case that under this Act the landlords are required to enter into written engagements with their tenants, in default of which no suit is maintainable to enforce the terms of the tenancy and that in case of the refusal by the tenant to accept a *patta* "such as the landlord is entitled to impose," the landlord can proceed under Section 9 to enforce the acceptance by a summary suit before the Collector.

It has to be remarked that in the Madras Presidency, or certain parts thereof, irrigated lands on which are grown what are called "wet crops," are generally subject to a higher rate of rent, either in kind or in cash, than those which yield only "dry crops," and that it is usual for the zamindars to enter into yearly engagements by tendering *pattas* from year to year and obtaining *muchilikas* or counterparts executed by the tenants evidencing the acceptance of the terms of the lease.

Shortly stated, the respondent's case as made in his plaint, is that the ryots, the defendants in the suits, prior to *Fasli* 1283 (approximately corresponding to 1876), paid rent for the lands in their occupation on the *Asara* or produce-sharing system, that in that year an arrangement was come to between them and the zamindar by which a money payment "was substituted for the share of the produce," that this arrangement, however, was subject to the condition that whenever "the lands were fit for wet cultivation the wet rates would be settled." And he went on to add in paragraph 3 of the plaint :—

"The lands mentioned in the tendered *patta* hereunto annexed having been newly brought under wet cultivation, and on the plaintiff's officials demanding defendant to accept the agreement as in the surrounding villages in respect of wet crop cist, he (the defendant) having refused to do so, the *Asara patta* with the rates prevail-

(1) [1910] 33 Mad. 177=6 I. C. 988=37 I. A. 110 (P. C.)

ing under the immemorial system of sharing the grain heap (*Palambaram* system) was tendered for the wet land cultivated by him (the defendant) for this year. As the defendant taking advantage of this, refused to come to any agreement in respect of the dry land also for which there was no dispute at all, the rates and *babuts* in respect not only of the said wet land, but also of the remaining dryland, were as usual entered in the said *patta*. All the terms of the tendered *patta* so far as they are connected with the *Asara* system are applicable to the *Asara* system, and the remaining ones to the *Veesabadi* system."

The ryots in their defence alleged that the arrangement introducing the *Veesabadi* or cash system into their villages was intended to be and was in fact permanent in character; that some years later (*Fasli* 1292) when the money rates were revised, the *Veesabadi* system was accepted as the basis of the new settlement; that recently they had been able, without any assistance or contribution from the plaintiff, to make their lands irrigable and fit for wet cultivation, and that the plaintiff was not entitled to revert to the sharing system and thus indirectly to enhance their rents without the interposition of the Collector's Court.

On these allegations of fact the parties went to trial. The issues framed by the Head Assistant Collector are not very clearly worded, but they sufficiently indicate the main points for determination, *viz.*, whether the substitution of the *Veesabadi* for the *Asara* system in the defendant's villages was permanent in its character or, in other words, was the plaintiff zamindary entitled to revert to the sharing system on the lands being made irrigable by the tenants.

The Collector on the evidence held in substance that the conversion of the *Asara* rates into cash payment in 1283, which was confirmed in 1292, and had been acted upon ever since, was a permanent arrangement, and that the plaintiff was not entitled to impose on the tenants on the *Asara* basis. He accordingly dismissed the plaintiff's suits without entering into the questions raised in the latter part of paragraph 3 of his plaint.

On appeal by the zamindar the District Judge affirmed the decrees of the Collector in respect of the finding of fact relative to the character of the arrangement of 1283, and upheld the orders dismissing the suits,

From the decrees of the District Judge the plaintiff preferred second appeals to the High Court of Madras. It is necessary to set out that portion of the High Court judgment which forms, in their Lordships' opinion, the key to the decision of the learned Judges. They say—

"Till *Fasli* 1283 the *Asara* system was in force. In *falsi* 1284 money rents were introduced and the rates of such rents were permanently fixed in *Fasli* 1292. At that time all the lands were dry. Wet cultivation began in *Fasli* 1314, and the *pattas* now in dispute were then tendered, as the tenants refused to pay more than the rates fixed in 1292 which they had previously been paying for the lands as dry. Nothing had been done by the plaintiff to provide facilities for irrigation. In the *muchilikas* executed by the tenants for *falsi* prior to 1314 there are clauses to the effect that the plaintiff may make an extra charge if wet or garden crops are raised on dry lands. The amount of such extra charges is not however stated. If the plaintiff is entitled to demand *Asara* rates, the rates mentioned in the *pattas* tendered are correct. The Courts below have taken the view that the plaintiff has tendered *asara* *pattas* as a means of enhancing the rent and that as he has not done anything to justify an enhancement of the rent, and has not obtained the sanction of the Collector for the enhancement, he is only entitled to the rents fixed in *Fasli* 1292.

"For the plaintiff it is contended that inasmuch as there is no contract as to the rates of rent payable on lands cultivated with wet crops, he is entitled under Clause 3 of Section 11 of Act VIII of 1865 to claim *varam* rates, it being admitted that no money assessment has been fixed under Clause 2 of that section.

"That there is no contract as to the rates of rent payable for wet cultivation is clear from the admitted *muchilikas*, the material clauses of which have already been referred to. The only rates fixed were for dry cultivation. The rates to be charged for wet cultivation were left undetermined. This being so, the contention for the plaintiff seems to be well founded."

They accordingly set aside the orders of the District Judge, and holding that the "*pattas* tendered by the plaintiff were proper *pattas* and that the defendants must accept them," they decreed the second appeal with costs in all the Courts.

On an application for review of judgment, the learned Judges appear, however to have thought that "the contract between the parties is contained in the admitted *muchilikas* and must be gathered from the construction of those *muchilikas*." They therefore rejected the application for review.

The ryot defendants have appealed to His Majesty in Council and two points have been urged on their behalf against the validity of the judgment of the High Court.

It is contended in the first place that no appeal lay to the High Court under Section 69 of the Act which provides for one appeal only from the order of the Collector to the Zillah Judge. This contention, however, ignores the provision of Section 372 of Act VIII of 1859, which, at the time the Madras Rent Recovery Act of 1865 was enacted, was the law regulating the procedure of the Civil Courts in India outside the Presidency towns. Under that section a special appeal lay to the Sadder Court from all decisions passed in regular appeal by the Courts subordinate to the Sadder Court. It is not disputed that the Zillah Judge's Court was subordinate to the Sadder Court, nor that the appeal to the Zillah Judge from the Collector's Court was a "regular appeal"—an appeal on law and facts. Later legislation substituted the High Court for the Sadder Court, and the District Judge for the Zillah Judge, but the subordination of the one to the other was maintained. The provisions of Act XIV of 1882, the law in force on the point are clear that an appeal lies from the order of the District Judge to the High Court, unless that right is taken away by express legislation or by some express provision of law.

The point that a second appeal lies to the High Court in cases arising under Act VIII of 1865, has been expressly decided in *Veeraswamy v. Manager, Pittapur Estate* (2) and the practice appears to have been ever since the passing of the Act for such appeals to be preferred to the High Court. Their Lordships would not be disposed to interfere with such a long-standing practice, even if they thought there was an implied rule against second appeals lying from the decisions of the District Judge with respect to adjudications under the Act by the Collector. Their Lordships must therefore, overrule the first objection.

In the second place, it is contended for the appellants that the High Court was not competent under Section 584 of the Civil Procedure Code (Act XIV of 1882) to set aside a finding of fact which had been concurrently arrived at by the two inferior Courts.

Sections 584 and 585 of the Civil Procedure Code (are) in these terms:—

"584. Unless when otherwise provided by this Code or by any other law, from all decrees passed in appeal by any Court Subordinate to a High Court, an appeal shall lie to the High Court on any of the following grounds, namely:—

"(a) The decision being contrary to some specified law or usage having the force of law;

"(b) The decision having failed to determine some material issue of law or usage having the force of law;

"(c) A substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits.

"585. No second appeal shall lie, except on the grounds mentioned in Section 584."

This distinctly prohibits second appeals on questions of fact and confines the competency of the High Court to deal with questions of law and procedure.

In the present case the sole question for determination was whether the arrangement entered into in 1283, and confirmed in 1292, was permanent. The plaintiff's allegation was that he was entitled under the circumstances to revert to the system that existed prior to 1283. The Collector and the first Appellate Court who alone were competent to deal with the facts, came to the conclusion that the arrangement was permanent. The muchilikas were only a part of the evidence on which they acted. It seems to their Lordships that the learned Judges, acting in inadvertence of Section 584 of the Code, assumed a jurisdiction which they did not possess. The rule relative to second appeals which was laid down by this Board in *Durga Chowdhurani v. Jewahir Singh* (3) is clearly applicable to the present cases.

On the whole their Lordships are of opinion that the judgment and decree of the High Court cannot stand. Sir Erle Richards has, however, submitted that the simple dismissal of the suits would seriously prejudice the rights of the zamindar with regard to the matters referred to in paragraph 3 of the plaint which were not dealt with by the Collector.

Their Lordships are of opinion that the best course under the circumstances would be to set aside the judgment and decree of the High Court with a declaration that the plaintiff is not entitled to enforce the acceptance by the tenants of the pattas tendered by him, and that the cases should be sent back to be remitted to the Collector's Court for the drawing up of

(2) [1903] 26 Mad. 518=13 M.L.J. 296,
1914 K—12

(3) [1891] 18 Cal. 23=17 I.A. 122=5 Sar. 560
(P.C.).

proper decrees and dealing with any other questions that may be outstanding in these actions between the parties. And their Lordships will humbly advise His Majesty accordingly.

The plaintiff-respondent will pay the costs of this appeal and of the proceedings in the Courts of India.

T. A. R. *Appeals allowed.*

Solicitors for Appellants—E. Dalgado.

Solicitors for Respondent—Douglas Grant.

A. I. R. 1914 Privy Council.

(FROM CALCUTTA.)

2nd December, 1914.

LORDS DUNEDIN AND SHAW, SIR JOHN
EDGE AND MR. AMEER ALI.

Hari Kishen Bhagat and others—Appellants

v.

Kashi Pershad Singh and others—Respondents.

Privy Council Appeal No. 74 of 1912.

(a) *Hindu Law—Widow—Alienation to be valid must be for legal necessity or consented to by reversioners—Burden of Proof is on alienee—Proof must be independent.*

To be valid as against the reversioners an alienation effected by a Hindu widow must be supported by proof *aliunde* that such alienation was made for valid and legal necessity and the onus of establishing such necessity rests on the person who claims the benefit of transactions with a Hindu widow or other females taking similar estates. The requirement of the law, may be fulfilled by proving the consent of the reversioners to the transactions. [P. 91, C. 1 & 2.]

(b) *Hindu Law—Reversioners—Consent must be express—Consent is that of the whole body of reversioners.*

Where an alienation is effected by a Hindu widow, with the consent of the reversioners, no proof of legal necessity is needed. The consent required is that of all persons who are likely to be interested in disputing the transaction. Such consent must be established by positive evidence and should not be inferred from ambiguous acts or be supported by dubious oral testimony (18 All. 146 Foll.) Mere attestation to a document by a relative of the widow does not necessarily import concurrence. (1869) M. I. A. 209 Foll.

[P. 91, C. 2.]

A. M. Dunne—for Appellants.

G. R. Lowndes—for Respondents.

Mr. Ameer Ali:—The question for determination in these appeals relates to the validity, as against the reversioners, of certain sales held in execution of decrees obtained on mortgages effected by a Hindu widow, who had succeeded to

her husband's estate on his death without leaving any issue. Shyamal Singh, the husband, died in 1842, and the widow, Dulhin Nawab Kumari, held the properties which form the subject of the present litigation, until the transactions the validity of which is challenged in these suits.

The first mortgage was executed by Nawab Kumari in favour of the defendant-appellant, on the 26th of November, 1877 in respect of three of the properties in her possession. On the 11th of July, 1882 she mortgaged the rest of the properties to Bhagat for a further loan, and in 1889 she gave him what is usually called in India a *ticca pottah* of the shares of Shyamal Singh in all the *mouzahs* save one. Under this usufructuary lease the defendant obtained possession of the shares covered by it.

In 1893 Bhagat brought a suit against Nawab Kumari on the mortgage of 1877 and in execution of the decree on that bond purchased the three properties to which it related. In 1897 he obtained a decree on the bond of 1882, in execution of which he himself purchased again the remaining properties held by the widow. He thus obtained possession of all the shares in the different villages which Nawab Kumari had inherited from her husband for a widow's estate.

Nawab Kumari died in 1900, and the plaintiffs, who are Shyamal Singh's brothers' sons, and whose reversionary right to his estate, though questioned in the first Court, is not disputed now, brought the present suits to recover possession of the properties held by Bhagat under the execution sales of 1893 and 1897, their main contention being that neither the mortgages executed by Nawab Kumari nor the sales thereunder affected more than her interest which ceased on her death. Hari Kishen Bhagat is the principal defendant, but his sons have been impleaded in both actions, as they are joint in estate and living in commensality with him, and are, therefore, necessary parties. The main defence to the plaintiffs' claims was that the mortgages were effected by the widow for valid and legal necessity under the Hindu law, and, further, that they were concurred in by the reversioners, and that consequently the defendants by virtue of the sales in question acquired the interests of the

widow as well as theirs. It is to be remarked that in neither of the mortgage-suits were the reversioners made parties.

At the time when the bond of 1877 was executed the nearest reversioner to Shyamal Singh was his sole surviving brother, Raghubir Singh. After him stood Ragubir's sons, of whom there were several, and the sons of two other brothers, Bhupal and Jagrup, who were dead at the time. Among these nephews of Shyamal Singh the names of Behari, the only son of Bhupal, and of Bajrung Sahai, a son of Jagrup and a plaintiff in one of the present actions, should be particularly mentioned, as they figure in the transactions in question.

In the instrument of 1877 the name of the widow is written by Bajrung Sahai Singh. He also appears to have purchased the stamp paper on which the bond is inscribed. Among the witnesses to the document are Raghubir and Behary. The name of the widow in the mortgage of 1882 appears to be written by Behari Singh, and one of the witnesses to this bond is Bajrung Sahai. On the lease of 1889 Nawab Kumari's name is written by Modenarain, a son of Raghubir, and the witnesses are Ram Parshad, another son of Raghubir, Bishan Parshad, one of the sons of Behary, and Bajran Sahai, who also appears to have identified the lady to the Registrar. Both the Courts in India have found that so far as the *ticca pottah* of 1889 is concerned, the debt contracted thereunder has been satisfied out of the usufruct of the properties covered by the lease.

The points for determination in these appeals depend on the transactions of 1877 and 1882 respectively. The law relating to the dealings of a Hindu widow with her husband's estate which devolves on her in default of issue is now too well settled to need a prolonged consideration. To be valid as against the reversioners, or to affect their reversionary rights, a charge created by a Hindu widow or an alienation effected by her can be supported only by proof *aliunde* that such debt was contracted or such alienation was made for valid and legal necessity, and the onus of establishing such necessity rests heavily on the person who claims the benefit of transactions with a Hindu widow or other females taking similar estates. The re-

quirement of the law may, however, be fulfilled by proving the consent or concurrence of the reversioners to or in the transactions. In the present cases the Trial Judge in a careful and well-considered judgment held that the defendants had failed to prove any valid and legal necessity for the mortgages executed by the widow. This view has been affirmed on appeal by the High Court of Calcutta, and there being thus a concurrent finding of fact by the two Courts in India, that subject is now out of the region of discussion. Both the Courts have further held in effect that the part taken by the reversioners with respect to the transactions in question did not amount to a consent to bind their interests.

In view of the facts and circumstances of the case, their Lordships have no hesitation in expressing their concurrence with the conclusion at which the Courts in India have arrived. The Trial Judge has carefully examined the phraseology of the two instruments, and he is of opinion that their language is fully consistent with the fact that the interest of the widow alone was intended to be charged. Nor is there anything to show that the reversioners who helped her to raise the loans understood it otherwise. There is no evidence that they benefited from the transactions, or that so far as they were concerned there was any need for the mortgages. Their Lordships think that when a "stringent equity," to use Lord Hobhouse's expression in the course of the argument in *Jiwan Singh v. Misri Lall* (1) arising out of an alleged consent by the reversioners is sought to be enforced against them, such consent must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests; and that such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony such as appears to have been relied upon in this case.

In *Raj Lukhee Debia v. Gokool Chunder Chowdhry* (2) this Board refused to affirm the proposition that mere attestation by a relative necessarily imports concurrence, and they added that when the

(1) [1895] 18 All. 146=23 I. A. 1=6 M. L. J. 47=6 Sar. 675 (P.C.)

(2) [1869] 13 M.I.A. 209=3 B.L.R. 57=2 Sar. 518= Suther 275=12 W.R. 47 (P.C.)

consent of the husband's kindred is relied upon for the validity of alienations effected by the widow

"the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu Law."

The observations of the Board in that case seem to their Lordships to apply with particular force to the facts of the present case.

On the whole, their Lordships are of opinion that the judgments appealed from are right and ought to be affirmed, and that these appeals ought to be dismissed with costs. And they will humbly advise His Majesty accordingly.

T. R. R.

Appeals dismissed.

Solicitors for Appellants—T. L. Wilson and Co.

Solicitors for Respondents—Theodore Bell and Co.

*A. I. R. 1914 Privy Council.

(FROM CALCUTTA)

11th May, 1914.

LORDS DUNEDIN, LORD MOULTON, SIR JOHN EDGE AND MR. AMEER ALI.

Bijraj Nopani and another—Appellants.
v.

Sm. Pura Sundary Dasee—Respondent.

Privy Council Appeal No. 99 of 1912.

** Deed—Construction—Interpretation of—Meaning of a deed is to be decided by the language used, interpreted in its natural sense—The deed reciting plainly that whatever right or title the several vendors had was to go to support the conveyance—This plain meaning should not be affected by speculations as to what particular right existing in the various vendors were present to the minds of some or all of the parties to the conveyance at the date of its execution.*

A testator bequeathed a house to his daughter and her heirs absolutely, subject to two charges of Rs. 20 per month payable for periods specified in the will. He appointed the said daughter's husband and her two sons, as executors under his will. The daughter died leaving five sons and two unmarried daughters. After her death her husband and one of her sons who was an executor also died. The sole surviving executor having had to discharge a mortgage on the property, executed to secure the moneys borrowed for the legal proceedings to obtain probate for the will; and being also pressed by the annuitants, execu-

ted a deed of sale in favour of the appellants, joining his two surviving brothers and one of the annuitants as co-vendors along with him. This deed made it clear that all the vendors conveyed all the title and interest they possessed in the property. One of the unmarried daughters brought a suit claiming half this property on the ground that it was her mother's stridhan and contended that though her brother could have conveyed a valid title to the purchaser, he being the sole surviving executor, he did not purport to do so but conveyed only as the beneficial owner of the property.

Held, that the deed plainly stated that whatever title or right the vendors possessed was to go to support the conveyance and it is a settled rule that the meaning of a deed is to be decided by the language used interpreted in its natural sense. Therefore it will be contrary to settled principles of law as well as most unjust to *bona fide* purchasers if this plain legal meaning is to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some or all of the contracting parties at the date of the deed. [P. 95, C. 1 & 2.]

Robert Finlay and B. Dube—for Appellants.

DeGruyther and A. M. Dunne—for Respondent.

Lord Moulton :—This is an appeal in a suit brought by the respondent against the appellants for a declaration of her title to an equal undivided half part or share in a certain house and premises known as 8, Sobharam Bysack's Street, Calcutta, and for recovery of the premises from the appellants, in whose possession they were at the commencement of the suit, with an inquiry as to *mesne* profits. The facts of the case, so far as they are material, are not now in dispute, and are as follows :—

The house and premises originally belonged to Prem Chand Bysack, who died on the 13th June, 1886, leaving a will, dated 25th October, 1884. By his will the said testator devised and bequeathed the said house and premises "to his daughter, Katyani Dasee, and her heirs absolutely," subject to two charges of 20 rupees per month, payable to two of his daughters-in-law and their children as and for periods specified in the will. He appointed as executors Shambhoo Nath Bysack (the husband of his daughter Katyani Dasee), and two of her sons, Hemendra Nath Bysack and Ratanlal Bysack. On application for probate of this will, the executors found that a caveat had been entered by some of the relations of the deceased testator, who alleged that the will was a forgery. This

led to a suit, where, after a prolonged inquiry, the Court, on the 16th May, 1887, pronounced the will to be genuine and granted probate of it, and directed that the costs of the executors should be paid out of the testator's estate.

It would appear that the executors had no funds in hand out of which they could meet the costs of this litigation, and they therefore mortgaged the property for a sum of Rs. 3,950 to Dwarka Nath Dutt, who had been their attorney in the probate suit, in order to secure the payment of his costs, which amounted to Rs. 3,400, the balance, Rs. 550, being treated as a loan to them. Katyani Dasee was made a party to the mortgage-bond apparently to put on record her wish that no portion of the estate should be sold to defray these costs. The term of the mortgage was 10 years.

Shambhoo Nath Bysack died in 1899, and Ratanlal Bysack died in 1891, leaving his brother Hemendra Nath Bysack sole surviving executor. In 1891 Katyani Dasee also died, leaving five sons and two unmarried daughters, of which the respondent was one.

In 1900 the heirs of Dwarka Nath Dutt, who had died in the meanwhile, instituted a suit against Hemendra Nath Bysack as sole surviving executor for sale of the property under their mortgage, and at the same time the two annuitants brought suits against him for arrears of their annuities. To meet these demands it was determined to sell the property, and accordingly by a deed, dated the 12th of December, 1900, the property was sold to the appellant Bijraj Nopani, one of the appellants, and Dowlatram, since deceased. The other appellants are sued as the executors of his last will and testament, one of them being Bijraj Nopani himself. It is on the interpretation of this deed of conveyance that the question now in issue depends, and in order to make clear the contentions of the two parties it is necessary to explain its form and to state how the dispute has arisen before discussing the construction of the deed.

The deed is made between Hemendra Nath Bysack and his two surviving brothers of the first part, Baroda Sundary Dasee, one of the annuitants of the second part, and Bijraj and Dowlatram of the third part. It recites that the pro-

perty originally belonged to Prem Chand Bysack, that he devised it to his daughter Katyani Dasee and her heirs absolutely, subject to a charge for annuities of Rs. 20 per month, to Baroda Sundary Dasee and Sonamoni Dasee respectively, and that he appointed Shambhoo Nath Bysack, Hemendra Nath Bysack and Ratanlal Bysack executors of such will. It then recites the obtaining of probate of the will after suit. It then recites the death of Katyani Dasee on the 8th day of April, 1891, leaving five sons and three daughters, and the death of two of the sons unmarried, and also the death of Shambhoo Nath Bysack on 9th January, 1899.

There next comes a recital that Hemendra Nath Bysack, on the 4th day of September, 1900, obtained an order whereby it was referred to the Registrar of the High Court to enquire whether there was any necessity for the sale of the said house, and what provision should be made to secure the payment of the legacies mentioned in the said will out of the rents and profits of the house. It next recites that—

"the said Hemendra Nath Bysack, the sole surviving executor of the said will, has since paid all the debts, liabilities, and legacies mentioned in the said will."

Then follows a recital that Sonamoni Dasee has filed a suit against the said Hemendra Nath Bysack for, amongst other things, a declaration of her rights under the said will, and that the vendors have taken upon themselves the responsibility of entering satisfaction in the said suit, as also of satisfying the claims of any of their sisters, and that therefore the petition will not be proceeded with. There next comes a recital that the vendors have agreed with the purchasers that Rs. 10,000 shall remain with the purchasers as security for the annuity to Sonamoni Dasee, and that the other annuitant has been paid off by a sum of Rs. 708 in full satisfaction of her claim against the property.

Here the recitals terminate and the indenture goes on to witness that the vendors have sold the property to the purchasers for Rs. 35,000, of which Rs. 10,000 are to be retained by them as security as aforesaid. The vendors grant, sell, and convey the property to the purchasers in ordinary form together with

"all the estate, right, title, interest, claim and demand whatsoever of the vendors unto and upon the said messuage, land, hereditaments, and premises and every part thereof, and also all deeds, papers, and writings solely relating to the said premises or any part thereof now in the custody of the vendors or which they can procure without suit."

Then follows a covenant in the following words :—

"The vendors do for themselves and himself, their and his heirs and representatives do, and each of them doth hereby covenant with the purchasers, their heirs, representatives, and assigns in manner following, that is to say, that the vendors at the time of sealing and delivery of these presents are lawfully, rightfully and absolutely in possession of and in the said messuage land, and hereditaments hereinbefore granted and conveyed as an estate equivalent to fee simple in possession, free from encumbrances, and that the vendor now have in themselves full power and absolute right, title and authority by these presents to grant and convey the said messuage, land, hereditaments, and premises unto, and to the use and behoof of the purchasers, their heirs, representatives and assigns from time to time."

Finally, there is a covenant to indemnify the purchasers against any loss at the suit of the annuitant, Sonamoni Dasee, or the three sisters (of whom the respondent is one), which may be incurred by them by or by reason of the defect, if any, in the title of the vendors to the property.

The appellants paid the purchase-money and took possession of the property under the conveyance, and remained in possession until the 22nd June, 1897, when the respondent brought the present suit, claiming that she was entitled to one-half share in the said house, because as she and her sister Kanak Manjuri Dasee were unmarried daughters they were entitled to share equally her property, inasmuch as it was *stridhan*. She claimed that she was not bound by the said sale.

The respondent's claim to a moiety of her mother's *stridhan* is admitted to be good in law, so that the only question in the suit is whether the conveyance was valid. It is plain that at the date of this conveyance the property was still in the hands of the sole surviving executor, Hemendra Nath Bysack, and therefore he was competent as executor to sell it to the appellants, who were *bona fide* purchasers for value. But the respondent contends that although Hemendra Nath Bysack was in a position validly to convey it to the appellants

as such executor, and did purport to convey it, he did not effectively do so, because the deed shows that he intended only to convey as a beneficial owner of the property, being under the impression that he and his two brothers, the co-vendors, were beneficially entitled to it as heirs to their mother, and being ignorant or forgetful of the right of the sisters to inherit in preference to them. It is on this ground alone that the High Court decided in favour of the respondent reversing the decision of the Judge of the Court below, who had held that Hemendra Nath Bysack had by the deed conveyed all the right and title he possessed in every capacity, including that of sole surviving executor of the will of Prem Chand Bysack.

Their Lordships are of opinion that the judgment of the judge of first instance was right and ought to have been affirmed by the Court of Appeal. In the first place the deed itself gives abundant evidence that the position of Hemendra Nath Bysack as sole surviving executor was viewed as material by the parties to the conveyance, inasmuch as there are careful recitals as to the original appointment of executors and as to the death of his co-executors. His position as sole surviving executor could have no bearing on the conveyance if it were not that it affected, or might affect, his title to convey. But even in the absence of such direct evidence that the conveyance was by him in his capacity as executor as well as beneficial owner (if and to the extent that he was such owner), the deed makes it clear that all the vendors convey all the title and right that they possessed in the property, and that would undoubtedly include the right and title which one of them possessed as executor. That this would be the ordinary rule is admitted by the Judges of the Court of Appeal, who base their judgment on what they consider to be indications in the deed and in the conduct of the parties that the intention was that only the beneficial interest possessed by the vendors should be conveyed. Their Lordships are of opinion that this would be to contradict the deed itself; and, moreover, they are of opinion that the matters referred to would not support the conclusion drawn therefrom by the Judges of the High Court even if it was permissible to permit

such considerations to affect the interpretation of the deed.

If the deed be considered from the point of view of the appellants who were the purchasers and who were not otherwise concerned with the property or its history, the transaction, as well as the deed which carries it out, become perfectly clear and intelligible. The property was by the will charged with two annuities, and in order that the executor might procure the funds necessary to pay the costs of past litigation the property was under mortgage. This mortgage was being called in and the sale was to enable the mortgage-money to be raised. The purchasers naturally desired a clear title free from entanglements. They therefore required that the mortgage should be paid off and the annuitants settled with or security given against their claims. For both these purposes it was necessary that Hemendra Nath Bysack as executor should be a party to the deed, because the original mortgage was effected by him for the purpose of securing the costs for which he was of course liable, and on his discharging the indebtedness as to costs he would become entitled to claim for the same as against the estate including the house in question. Moreover, it is abundantly clear from the executor's accounts and from all the facts appearing in the record that the house still formed part of the undivided estate and that therefore he would be liable to pay the annuitants the amounts of their annuities from time to time, as he had been doing for years past. The purchasers would not be likely to trouble themselves as to the question of whether or not the property would ultimately go to the sons or daughters, but would take care that all the persons in whom title could in anywise exist should join in the conveyance, and that they should be guaranteed against claims from those who did not do so. This is what the deed shows to have been done, and it would be entirely contrary to settled principles of law as well as most unjust to *bona fide* purchasers if the Courts were to allow its plain legal interpretation to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some or all of the parties to the conveyance at the date of its execution. The deed states plainly that what-

ever right or title the vendors possess is to go to support the conveyance, and it is a settled rule that the meaning of a deed is to be decided by the language used interpreted in its natural sense. From this wholesome rule their Lordships see no reason for departing in the present case.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed and that the judgment of the Court of Appeal should be set aside, with costs, and the judgment of the Judge of first instance restored. The respondents will pay the costs of this appeal.

T. S. N.

Appeal allowed.

Solicitors for Appellants : — Barrow, Rogers and Nevill.

Solicitors for Respondent : — Burton, Yeates and Hart.

* * A. I. R. 1914 Privy Council.

(FROM ALLAHABAD.)

18th March, 1914.

LORDS MOULTON, SUMNER AND
PARMOOR, SIR JOHN EDGE AND
MR. AMEER ALI.

Lala Mahabit Prasad and others—Appellants

v.

Mt. Taj Begum and others—Respondents.

* * (a) *Pardanashin lady*—Benami mortgage in favour of legal adviser—Extortionate terms of deed—Onus lies heavily on mortgagee to show that his client was aware of the effect of the deed and the transaction was fair and honest.

In a case where the Legal Adviser of a Pardanashin woman acts the part of money-lender to her and procures the execution of a mortgage-bond by her to secure its repayment, the Court is entitled and also bound to examine the transaction with close scrutiny and sternly insist on the mortgagee showing that the client was fully aware of the meaning and effect of the deed, and that the transaction was a fair and honest one.

[P. 96, C. 2.]

(b) *Substitution*—Mortgagor agreeing to substitution of property got on partition is bound by it.

Where there was a clause in the mortgage-bond to the effect that after the partition between the mortgagor and her co-sharers, the properties awarded to the mortgagor should be substituted as security, the clause would be operative and would subject the whole of the mortgagor's share to the mortgage.

[P. 96, C. 2.]

(c) *Pardanashin lady*.—Knowledge of her relatives is not sufficient to discharge the burden of proof.

The fact that a brother and two relatives were aware of the transaction is not sufficient to support her alienation without evidence that the transaction was explained to the lady and its legal effect clearly understood by her, especially when their conduct stood against the supposition that they were defenders of the lady's interests.

DeGruyther and *B. Dube*—for Appellants.

A. M. Dunne—for Respondents.

Lord Moulton:—In this case their Lordships have before them two appeals from two decrees and judgments, dated 2nd December, 1910, of the High Court of Judicature for the North-Western Provinces, Allahabad. The suit in which these appeals are brought is a suit for the recovery of money due on a registered mortgage bond alleged to have been executed by the defendants *Musammat Taj Begum* and *Syed Sultan Muhammed Khan* in favour of *Lala Ramanuj Dayal* (since deceased), father of the appellants. The facts of the case are as follows:—

Musammat Taj Begum is a *pardanashin* woman, and *Sultan Muhammad Khan* is her younger brother. Prior to June, 1895, they had been engaged in law suits with the members of their family to recover their shares of inheritance in the property of their father *Syed Mir Khan*, and one *Babu Raghbir Saran* had been the pleader representing them in these suits. The litigation terminated in their favour, and a decree of partition had been pronounced, but the time for appeal had not expired, and it is not seriously contested that at the date of the execution of the mortgage bond *Babu Raghbir Saran* still stood to the defendants in the position of their legal adviser. The mortgage-bond was nominally executed in favour of *Lala Ramanuj Dayal*, but it is admitted that he was only *benamidar* for *Babu Raghbir Saran* who was the real mortgagee. The amount of the money advanced by the mortgagee was 8,000 rupees, of which 4,773 is said to have been cash, and the balance went mainly, if not entirely, in the discharge of moneys due from the defendant *Syed Sultan Muhammad Khan*. The greater part of this indebtedness appears to have been to *Babu Raghbir Saran* himself. The whole of the property mortgaged belonged solely to *Musammat Taj Begum*.

• It follows, therefore, that we have a case of the legal adviser to a *pardanashin*

woman acting the part of money-lender to her, and procuring the execution by her of a mortgage-bond to secure its repayment. It is difficult to conceive a case in which the Court would be entitled and indeed obliged, to examine the transaction with closer scrutiny, or to insist more sternly on the mortgagee supporting the heavy onus of showing that the client was fully aware of the meaning and effect of the deed, and that the transaction was a fair and honest one. The appellants have entirely failed to support either of these issues. The Judge of the Court of First Instance has found that the interest, which was compound interest at the rate of 1 per cent. per month (with half-yearly rests) was unconscionable, and has accordingly reduced it, and although an appeal was brought against this part of his decision it was dismissed by the High Court, and the appeal against that decision has not been persisted in before their Lordships. The case of the appellants with regard to the other issue is equally hopeless. There are concurrent decisions of the two Courts to the effect that the plaintiffs have failed to prove that the meaning and effect of the mortgage-bond was duly explained to the real defendant *Mst. Taj Begum*. The facts relating to this issue are as follows.

The property set out in the schedule to the mortgage-bond as being the property mortgaged, consisted of property belonging to and in the possession of the defendant *Mt. Taj Begum*. But a clause was inserted in the mortgage-bond to the effect that after the partition should have been effected the property awarded to that defendant in that partition should be substituted for the scheduled properties. It is admitted that the effect of this clause would be to quadruple the amount of property mortgaged. The Judge of First Instance finds that there is no evidence that this was properly explained to *Mst. Taj Begum*, but holds that this does not invalidate the execution because in his opinion the clause would be inoperative. Their Lordships are unable to agree with this opinion. The clause is clear in its language, and if the mortgage-bond had been valid would have subjected the whole of the lady's share to the mortgage. The High Court also finds that the plaintiffs have not shown that this clause was properly explained to the lady, and

their Lordships entirely concur in its finding.

It follows therefore that as against the present appellants it must be taken that the terms of the mortgage-bond were extortionate and that the lady, the mortgagor, did not understand the effect of the deed by reason of its not having been adequately explained to her. The deed is therefore void and cannot be enforced against her.

The Judge at the trial who decided in favour of the deed (subject to the alteration in respect of the rate of interest) appears to have been influenced by the consideration that the relatives of the lady must have been aware of the transaction because her brother was a co-signatory of the deed, and two of her relatives were the identifying witnesses. Apart from the question of the sufficiency of such a consideration their Lordships are of opinion that the facts of the case entirely destroy any inference that the relatives of the lady were acting as a protection to her in the transaction. Her brother was personally interested in carrying through the transaction, because by it he obtained the discharge of debts for which he alone was primarily liable, and this relief was obtained by mortgaging property in which he had no interest. With regard to the other relatives it is clear that the family generally were taking gross advantage of the unprotected state of this *pardana-shin* lady. She had been betrothed but the relations would not give consent to her marriage unless she surrendered the whole of her share in the family property. Their Lordships can only express their great surprise that under these circumstances the relatives should have been regarded by the Trial Judge as defenders of the lady's interests.

This point is sufficient to decide the case, it is not necessary to refer to other points raised in the proceedings.

Their Lordships will therefore humbly advise His Majesty that these appeals should be dismissed with costs.

T. A. R. *Appeal dismissed.*
Solicitors for Appellants — Barrow,
Rogers and Nevill.
Solicitors for Respondents — Douglas
Grant.

A. I. R. 1914 Privy Council.

(FROM LOWER BURMA.)

25th February, 1914.

LORDS SHAW AND MOULTON AND
MR. AMEER ALI.

Ma Nhin Bwin—Appellant

v.

U Shwe Gone—Respondent.

(a) *Buddhist Law (Burmese)—Succession—A sister succeeds to the property of her deceased sister, in preference to their father, where the sisters have been living apart from and independent of their father—Manu Kyay is of the highest authority among the Dhammathats and where it is clear no reference need be made to other Dhammathats.*

Three sisters were living together apart from and independent of their father and were carrying on a flourishing trade in cocoanuts. Two of them died, and their father claimed to inherit to their property. The surviving sister contested the claim.

Held, the claim can be decided by reference to a single clear governing authority, or the *Dhammathats* may be collated and judgment determined by the best balance which can be framed as the result of their *dicta*. [P. 100, C. 1.]

As *Manugye* clearly says that brothers or sisters of the deceased are to be preferred to his or her parents, the father is to be non-suited in this case, as the *Manugye* is of the highest authority among the *Dhammathats*, and as where it is clear no reference need be made to other *Dhammathats*. Also on an examination of the other *Dhammathats* the same result is reached. [P. 103, C. 2.]

But it must be remembered that the idea of the powers of a parent in his patriarchal capacity over an undivided household may lead to conclusions which hold no place in rules of succession to the estate of children who have left the father's establishment and become separately settled in life. [P. 99, Cols. 1 and 2.]

Sections 310 and 311 of the Volume I of the Digest of Burmese Buddhist Law considered and the contradiction between the two sections explained. *Dhamma* and *Manugye* referred to. Cases of

Mi San Hla Me (1894)	} Distinguished.
Maung Chit Kywe (1895)	
Mah Gun Bon (1897)	
Mah E Dok (1898)	
Maung Shwe Bo (1899)	

(b) *Buddhist Law—Burmese—Nature, Scope, etc., of Dhammathats discussed—Manugye is of the highest authority.*

Manukyay is of the highest authority among the *Dhammathats* and where it is clear no reference need be made to other *Dhammathats*—Nature, Scope, etc., of *Dhammathats* discussed. [P. 103, C. 2.]

Coltman and *A. H. Houston*—for Appellant.

DeGruyther and *E. U. Eddis*—for Respondent.

Lord Shaw :—This is an appeal from a judgment and decree of the Chief Court of Lower Burma. The judgment is dated the 14th June 1910, and it reverses a decree of the same Court in its Original Civil Jurisdiction, dated the 16th February, 1909. The appeal is also from an order, dated the 2nd September, 1910, which rejected the appellant's application for a review of the decree first mentioned.

The question to be afterwards dealt with is one of widespread importance, affecting the rights of succession in Burma. It is, however, necessary to state the circumstances, which are few and plain, in such a way as to show the limits of the decision which is about to be pronounced. These will appear as the narrative proceeds.

The respondent, U Shwe Gone, had three daughters by his first marriage. These were Mah Nhin Bwin, the eldest, Mah Nhin Boo, about two years younger, and Mah Nhin Ghine, about six years her junior. The eldest, Mah Nhin Bwin, is the appellant in this case. She was born about the year 1865.

These three sisters lived together apart from their father. They traded in coconuts in the Municipal Bazaar at Rangoon. This state of matters lasted for many years, and one of the outstanding facts in the case is the complete separation of these ladies from their father, who had married again. They were, in fact, independent traders. In later years their business appears to have been of considerable importance. One part of it, for instance, mentioned in the proceedings, is three cargoes of Nicobar nuts, of which one of the ladies was consignee, and the combined value of which amounted to a large sum. In the year 1899, the three sisters bought a house in Rangoon with money derived from the profits of their trading, and they thereafter always lived there together. What were the exact relations in the eye of the law as between these three ladies need not be determined in this case. Whether they were all, or any two of them, in full partnership or in joint adventure with each other does not require to be decided in view of the events of death which happened, and of the opinion on the legal point of succession which is afterwards to be announced.

In May, 1905, Mah Nhin Ghine died. Her sister Mah Nhin Boo, took out Letters of Administration and took possession of her property. Their father the respondent however, made a claim thereto, and threatened proceedings but nothing further was done. In June, 1906, Mah Nhin Boo died of plague. Of the three sisters, the appellant was thus the sole survivor.

Should it accordingly be determined, as the respondent contends, that he, being the father of these two deceased ladies, is entitled by the law of Burma to succeed to their property as their heir in preference to their surviving sister, then the *corpus* of the estate whether it originally belonged to the one sister or the other, or to both, will go to him. If, on the other hand, as the appellant, the surviving sister, contends it be the case that she is entitled as such to succeed as heir to her sisters, then again the entire *corpus* of the estate of both will pass to her in preference to her father. The point to be determined in this case is which of those two contentions is correct according to Burmese Buddhist law.

A subsidiary question was raised in the appeal. It was founded upon allegations of commercial partnership, existing between the appellant and her sister, Mah Nhin Boo. Separate issues, which in appropriate circumstances might come to be of great importance under the law of Burma, were raised as to the rights of a surviving partner, on the one hand in a full partnership, and on the other in a limited partnership or co-adventure. These questions have not been lost sight of, but they are superseded by the conclusion to which their Lordships have come to as to the right of succession in law by the father on the one hand, or by the sister on the other. The right of succession being determined in favour of the surviving sister carries with it and covers subsidiary rights of partnership as among the sisters *inter se*. No pronouncement accordingly is necessary in regard to the separate case under this head.

A still further question has been argued, and it is well illustrated by the course which the case took in the Courts below. The learned Judge in the Court of first instance held that by Burmese Buddhist Law the respondent, the father, was entitled to succeed to the estate of his two

deceased daughters in preference to the appellant, their sister. But he also held, however, that the father by his conduct, which in the opinion of the Court amounted to "desertion" and intentional and deliberate neglect "of the ordinary duties of affection and kindred," had forfeited the right of succession which would otherwise have opened to him, and that for this reason the suit, which was to declare such a right of succession, must fail. On this latter point, the Appellate Court came to a different conclusion, holding that the respondent's conduct had not been so grave and reprehensible as to justify forfeiture. Accordingly agreeing as it did with the Court of first instance, that the father fell to be preferred as the heir entitled to the succession to his daughter's estate, they affirmed that right and gave a decree in his favour. But the Appellate Court, in reaching their conclusion as to the import of the appellant's conduct, showed very clearly by their judgment that, so far as actual separation in life of the daughters from their father was concerned, this had been established beyond doubt; and in short it may be taken as a salient fact in the present case that the life lived for years by these ladies was lived as a life separate from and independent of their father.

The need for this fact being pointedly alluded to is that their Lordships are desirous that the present case should not be held as dealing with or affecting parental rights in cases where the family continues to live together. The rights of a parent in Burma in such circumstances appear, according to their traditions and text-books, and to Eastern patriarchal ideas, to be of a high order; and they indeed recall to the mind various drastic rules of the earlier Roman law with regard to the scope of the *patria potestas*. Many illustrations arise in the books, but one may suffice. It is mentioned in even the *Manu Kye*, the authority of which is the subject of separate treatment hereafter, that an impoverished parent could sell his children into slavery. These observations are, of course, not made to give any colour to the view that rights to such an extent still remain in modern Burmese law or practice, but to indicate that the idea of the powers of a parent in his patriarchal capacity over an undivided household may lead to conclusions which hold no place

in rules of succession to the estate of children who have left the father's establishment and become separately settled in life.

On the broad, distinct and simple issue now to be determined, it might have been thought that the recorded traditions and legal institutes of the country would have been clear. Unfortunately it is very far from being so. This may no doubt be accounted for to some extent by the fact alluded to by Burge ("Colonial and Foreign Law," I. 60), that litigation was appealed to when the parties refuse such compromises as many be "suggested by relations and village elders." This salutary practice of compromise has the disadvantage, however that its results do not enter the records or procure the stamp of authority for a guide in future cases. So far as these results or the decisions of local native tribunals are concerned, they appear to have failed to find a place in the chronicles of the people.

There were, however, as there are still, documents that could be appealed to, all of them authoritative, but varying in the weight of their authority. These are the *Dhammathats*, usually reckoned as thirty-six in number. They form the expositions of, *inter alia*, customs and juridical rules, their dates of issue varying sometimes by many hundreds of years. It is no doubt true that with regard to them a certain evolution can be traced, and it seems by those who have written on the subject also to be admitted that they differ from the ordinary legal institutes in this sense, that a change of dynasty was sometimes accompanied by a fresh composition in the shape of a new, and, it might be, a comprehensive *Dhammathat* which, while not removing or extinguishing its predecessors, appeared upon the scene clothed with the authority of the fresh Government and containing the latest revisal of accepted juridical doctrine.

It appears to be acknowledged that the laws, or rules, contained in the earlier *Dhammathats* were in their remotest origin derived from the laws of Manu, which reached Burma by way of Southern India. But with the establishment of Buddhism and the spread of Buddhist doctrine came, in the course of time, the not unnatural desire to strengthen the

sanctions of juridical rule by associating its foundations, the *Dhammathats* themselves with the religious sentiments of the people, and in the later *Dhammathats* the commands, precepts, and principles are represented as truly being emanations from the spirit of Buddha himself.

This state of matters must have made the administration of justice still dependent on a comparison of *Dhammathat* with *Dhammathat* and a balancing of the weight of their authority. It cannot be said that at the present moment such difficulties have disappeared. Traces of them, indeed, are plain enough in the present case and one cannot peruse the judgments under review without noting the care with which the learned Judges of Burma address themselves to this task.

There are two views which may be taken. Either the subject is dealt with sufficiently by a single clear or governing authority, or the *Dhammathats* as a whole must be collated, and judgment determined by the best balance which can be framed as the result of their *dicta*. The judges of the Court below have adopted the latter course, and with regard to it their Lordships are not satisfied that even on such a collation the balance has been correctly struck. But the importance of the subject induces their Lordships to put on record how this matter stands according to all the *Dhammathats*, if the version contained in the Digest of the Burmese Buddhist Law concerning inheritance and marriage prepared by Mr. Gaung be taken. Mr. Gaung was a member of the Legislative Council of the Lieutenant-Governor, and the Digest was prepared under the authority of the late Judicial Commissioner and is published with the sanction of the Government of Burma.

As showing the variety and conflict of the *Dhammathats*, reference may be made in particular to Sections 310 and 311 of volume I of the Digest of Burmese Buddhist Law on the subject of inheritance. Section 310 refers to relatives of previous generations who are not entitled to inherit." And the rule of the *Manu Kye* is thus cited.

"The rule whereby elder relatives are debarred from inheritance is as follows:—The co-heirs live apart from one another; one of them dies without leaving a wife or a husband or a child; his or her estate shall be partitioned among his or

her younger brothers and sisters, but not among the elder co-heirs."

The point of the citation is as to the significance of the word "co-heirs" in this passage, and that is illustrated by Section 311, where Mr. Gaung quotes from the *Dhammara*:—

"The five kinds of co-heirs are the following, namely, one's elder and younger brothers, elder and younger sisters, and their children."

It would thus appear that it was not within the conception of the *Manu Kye* on this particular Section 310 to reckon the parent as having a preferred right to the co-heirs. The co-heirs came first, namely, the brothers and sisters of the deceased; and the point of the section is that as among these it was the younger brothers and sisters that were preferred to the elder co-heirs. As stated, the introduction of the parent as to be preferred to brothers and sisters as a class and as a whole is completely negatived.

But their Lordships recognize that the real difficulties of the case—and that the difficulties are real is established not only by the consideration given to the matter by the learned Judges in the present case, but by the course of Burmese decisions to which they refer—arise from the construction of Section 311. That section deals with "relatives of previous generations who are entitled to inherit."

The conflict had better be exhaustively set forth and the forces on either side stand in this way:—

On the side of preferring the parents and ignoring the brothers and sisters, the *Dhammathats* stand as follows:

Manu.—"On the death of a person leaving not even a casually adopted son, his or her parents may inherit."

Various other *Dhammathats* are cited by Mr. Gaung to the same effect as this extract from *Manu*.

Vilsa.—"In the absence of descendants the parents are entitled to inherit."

This is repeated—almost literally—in *Dhammathat Kyaw*, in *Nandaw*, and in *Vannana*.

Razathat.—"If the deceased person leaves no wife, children, grandchildren, or other descendants, his parents, grandparents, or other relatives of previous generations are entitled to succeed to the estate."

To the same effect is the extract from *Varulinga*, namely, "In the absence of sons, including those publicly or casually

adopted, the parents are entitled to inherit."

Finally comes *Kyannet*.—"In the absence of wife and children, the parents are entitled to inherit the estate of their son."

It is plain that these extracts do not proceed upon the principle of express exclusion of a right of succession by brothers and sisters. The brothers and sisters are omitted or ignored in the statement of the succession.

On the other side, the same section (Section 311) cites later *Dhammathats* which give very ample warrant not for ignoring, but for recognising, and for placing in priority to parents, the rights of succession on the part of brothers and sisters. The historical light in which these later *Dhammathats* should be viewed will be remarked upon later. But meantime this observation may be made. The opinion appears to be entertained that the Burmese Empire was in the 18th Century of the Christian Era one of the greatest Empires of the Eastern world. But it is at least certain that in the middle of that century a strong attempt was made to put the Jurisprudence of Burma into a settled and more easily referable form. In the reign of Alompra, one of his ministers, a judge, completed a prose *Dhammathat*, known as the *Dhamma*, and the citation from the *Dhammathats* affirmatory of the right of succession on the part of brothers and sisters as in preference to parents becomes thereafter fairly clear.

These citations are as follows:—

The Dhamma

"If a deceased person has neither co-heirs nor descendants, his or her parents shall inherit the estate."

It has been already made clear that co-heirs include brothers and sisters, and the exclusion of a right of succession by the parents if such brothers or sisters are alive is thus plain:

The Manukye:

The general rule is that relatives of previous generations shall not inherit the property of their descendants. But if a person dies leaving neither wife, children, brothers nor sisters, his parents become his sole heirs."

The Vannana has been already cited as ignoring the rights of brothers and sisters in one passage, but in another the situation is expressed thus:

"Failing children, the parents or brothers and sisters of the deceased are entitled to inherit."

The Rajabala:

"In the absence of husband or wife, children, and brothers or sisters, the parents are entitled to inherit."

The Manu:

"If children living apart from their parents die leaving neither heirs nor co-heirs, their parents inherit the estate."

Cittra:

"In the absence of heirs, parents, grand-parents, or other relatives are entitled to inherit."

Kyetyo:

"In the absence of other relatives, the parents are entitled to inherit."

It will be subsequently shown that by the use of the phrase, "in the absence of other relatives" is meant simply "in the absence of brothers and sisters." This would necessarily appear to be so. And it is from this body of authority quite manifest that the right of parents is not only not preferred, but is on the contrary very plainly postponed to the rights of succession on the part of brothers and sisters.

With regard to the *Dhammathats* as a whole it has to be admitted that the figurative language so frequently employed becomes little helpful in expiscating the idea of inheritance. "It is natural," says *Razathat*, "for sea-water to flow back into the ocean after entering rivers and streams"; and in other passage, "when lakes are full, the overflow is returned to rivers and streams, and tidal water always flows back to the ocean." In later centuries the mind of the commentators was still struggling with these figurative expressions; as, for instance, in the *Manu Vannana* "In the absence of wife and children, the parents inherit. Why so? Because of the water which flows into the sea a portion returns up the river." The figure which earlier appears is the simple one of water which cannot find an outlet being borne back to its source; but as the *Dhammathats* develop, it is found that the source of the returning water cannot be reached until the intervening inlets and creeks have all been filled up, and there appears to be the conception accordingly, not of at once reaching to the source, namely, the parent, without having exhausted the collaterals, namely the brothers and sisters. These struggles with figurative language appear even in the decisions in recent times in the Courts in Burma, and, as is not obscurely indicated in some of these judg-

ments, they rather perplex than help the mind.

In their Lordships' opinion the balance of the authority of the *Dhammathats* is upon the side of the sisters and brothers of the deceased being preferred to the parent. It has been already noted that there is nowhere throughout any of the *Dhammathats* a specific exclusion of brothers and sisters, and it may further be added that the language of the earliest *Dhammathats*, where collaterals are, as has been stated either omitted or ignored, seems not to be analysed or explained or the omission accounted for in the later *Dhammathats* holding the same view, and the concurrence is a mere repetition. Their Lordships incline to the opinion—and a special reason therefor will be immediately given—that a clearer note is struck by the *Dhammathats* from the time of the 12th Century of the Burmese or from about the middle of the 18th Century of the Christian Era. Brothers and sisters as such, co-heirs, as such, and relatives as such, are all dealt with and find a place in the discussion, and wherever they appear as a class they appear in the first rank, that is to say, in the rank preferred to parents.

But these views of their Lordships are fortunately confirmed by another and an historical consideration. There can be little doubt that in the middle of the 18th Century of the Christian Era the conquest and subjugation of the country by Alompra was accompanied by a serious attempt by him and his high functionaries of State to place the jurisprudence of the Country in a position of fresh and settled authority. One of his ministers, supposed to be a Judge, issued under the Royal authority one *Dhammathat* in prose, known briefly as a *Dhamma*. Another, "in charge of the moat of the City of Shwebal," and taken by Dr. Forchhammer to have been Alompra's Minister of War, compiled in prose the *Manugye* or *Manu Kyay Dhammathat*, and it is this document last mentioned which was issued by Royal authority in 1756, and which obtained the commanding position which it seems to have occupied for a succeeding period of nearly 170 years.

What was the attitude of the British Government in respect to these particulars constituting the foundations of Burmese law? A period of about a Century

in the case of Lower Burma and a period of about 130 years in the case of Upper Burma intervened between the Alompraic Code and the British occupation. During this intervening period the Burmese jurisprudence had existed on the footing just described.

It would have been, of course, open to the British Government to adopt the ancient practice of issuing a fresh and authoritative Code. But it was more in accord with the genius and practice of the extension of British rule and of the incorporation of various races and populations within the British Empire to accept the native laws in their main elements in so far as they contained a working system of jurisprudence which was in accord with the traditions and habits of the people. This later course was adopted. An instance to hand may be cited: In 1892, after the overthrow of King Theebaw and the establishment of settled order in Upper Burma under the British rule, a circular was issued "for the assistance of the Courts in dealing with questions of Buddhist law." The circular issued a translation of the Letters Patent in use under the Burmese Government for the appointment of Judges. A list of *Dhammathats* was appended to it, but, as showing the complexity of the subject, the Judicial Commissioner adds that he "will be glad of information regarding any copies that may be extant of any of these *Dhammathats* other than the more commonly known ones." After a recital of many resounding titles of the Sovereign, including that of "Mighty Fountain of Justice", a circular proceeds thus—

"Now with respect to the office of Judge, it is on this wise: In the Kingdom of which we are the Sovereign ruler our numerous subjects must not be permitted one to oppress another, and the Judges must admonish and chastise, repress and judge, in case of dispute they must, in accordance with the *Dhammathats*, enquire into the causes of the people and decide between them, and for this purpose they are appointed to the Courts as Judges."

This is the general rule, involving as it does that judicial task the difficulty of which has been already mentioned.

To recur to the *Manu Kyay* which for so long had been recognised as the leading guide in the administration of justice Professor Forchhammer, in his *Treatise on the sources and Development of Burmese Law*, thus describes it:—

"This Law Book is written in plain Burmese with very little Pali intermixed. It is not really a Code or a Digest of Law, but rather an encyclopædic record of existing laws and customs and of the rulings preserved in former *Dhammathats*. Manu Kyay does not attempt to arrange the subject-matter or to explain or reconcile contradictory passages; religious elements are freely introduced; unjust Judges shall suffer punishment in Hell with head downwards; a man to whom deposits are made must be strict performer of his religious duties; a person guilty of perjury will be visited by preternatural punishments."

And having dealt with the development of Burmese jurisprudence and made a division of it into three periods, Dr. Forchhammer concludes thus:—

"The Manu Kyay incorporates the contents of the Law Books of the first and second period and records laws and customs existing among the people of his time. It deals with the religious laws and usages of the Brahmins and the monastic rules of the Buddhists clergy. It allows the Buddhist element to predominate and draws largely from the Buddhist Scriptures."

It is not seriously disputed that the authority of this text-book, where it is clear, as among the *Dhammathats*, is of the highest rank. And accordingly, when British rule was extended over Burmese territory, the recommendation to the Judicial Officers substantially accepted this situation as it was found. In the words of Dr. Forchhammer:—

"The Manu Kyay is to this day the most widely read and studied law book in Burma, and after the British had taken possession of this province the natives pointed to this *Dhammathat* as containing the body of laws by which they had been governed."

Much has been done during the last thirty years to extend the knowledge of the various *Dhammathats*; and the labours and encouragement of the Judicial Commissioner, Sir John Jardine, have greatly assisted this extension. The Manu Kyay itself has been textually translated by Dr. Richardson, and is in familiar use as a work of reference; and their Lordships do not understand that the pre eminent authority of this *Dhammathats* has been lowered by the labours of other authors or the translation of other *Dhammathats*.

On the point in issue in the present case, the Digest of Mr. Gaung represents the *dicta* of the Manu Kyay thus:—

"The general rule is that relatives of previous generations shall not inherit the property of their descendants. But if a person dies leaving neither wife, children, brothers nor sisters, his parents become his sole heirs."

There does not seem to be any room for ambiguity here. Both classes are dealt with. The one class wife, children, brothers, and sisters are specifically and exclusively preferred to the other class, namely parents.

In the tenth Book, Chapter 19, of Dr. Richardson's translation, the text reads thus:—

"Though this is the law (that property shall not ascend), why is it also said the father and mother of the deceased have a right to his property? Because if the parents be alive and the deceased has no other relations, they shall inherit his property."

In short, the Manu Kyay is clear that the property cannot ascend to parents unless there be no other relations, and "relations," it should be added, are as appears clearly from Chapters 17, 19, 22 and 25 of the same book, synonymous with brothers and sisters.

Their Lordships do not think it necessary accordingly to pursue the enquiry further. In this *Dhammathat*, which still remains of the highest authority, the succession of brothers and sisters in preference to parents is established beyond doubt. This being so, the other *Dhammathats* do not require to be appealed to to clear up any ambiguity. Were that appeal to be made it would, in the opinion of their Lordships, as already stated, lead to the same result.

The doubt, however, thrown upon the subject by the judgments of the Courts below can be explained to some extent by a brief glance at the developments of authority on the subject.

The sense of the Manu Kyay and the authority of its rule, as above expounded, seem to have been accepted in Burma until the year 1894. On the 12th November of that year there occurred the case of *Mi San Hla Me* and the narrative is observable:—

"The two Lower Courts have held that according to Buddhist law property cannot ascend where there are collateral heirs, and they have awarded plaintiff's claim. The general rule that property shall not ascend is laid down in the Manu *Dhammathat*, Book 10, Sections 1, 18, 19, but the rule is not without exceptions."

(It may be noted that the "*Manu Dhammathat*" here referred to is simply the Manu Kyay).

The exception referred to in that case had reference to the separation of one from his adoptive brothers and sisters, and to an adopted son living with his

adoptive mother. It is manifest that this so-called exception has nothing to do with the present broad and general case. And it is also clear that the law as above laid down was held to be the general law of Burma.

Thereafter, however, a certain mischance arose by way of what is reported as an *obiter dictum* in the case of *Maung Chit Kywe* in the year 1895. The substantial question in the case is described as "whether the brothers and sisters of the father of the deceased Mah Pean who was unmarried have under the rules of inheritance in the *Dhammathats* a title to the estate of Mah Pean superior to any title of the defendant as step-father living with the deceased." Here it is also quite clear that the broad and simple question now to be determined was not before the Court. The step-father was held to have no equitable claim, but in the course of the judgment there occurs this sentence:—

"The Buddhist law is opposed to the ascent of inheritance, but when it cannot go by descent the inheritance is allowed to ascend, first to the father and mother, and failing them, to the first line of collaterals and in the absence of heirs in that degree, to the grandfather and grandmother and the next line of collaterals."

By "the first line of collaterals" is here meant the line of the father and mother and it will be observed from this sentence that the true line of collaterals, namely the sisters and brothers of the deceased themselves, appears to be excluded from the succession, although on each of the higher lines they are included, that is to say, uncles and aunts would be preferred to the grand-father, although brothers and sisters would not be preferred to the father. Whatever may be said of this reasoning, at all events it is probably sufficient to observe that it is not applicable to the question in the present case, and it was not necessary to that decision.

In 1897, however, the case of *Mah Gun Bon* was tried, determining that the estate of a deceased step parent or grand-parent goes by descent to the step-children or grand-children in preference to collateral relatives by blood. Again it must be observed that the broad and simple question now to be determined was not before the Court. Many citations are made from the *Dhammathats* and, as generally happens, these texts appear to be some-

what inconsistent with each other, but whether they are so in reality or not is difficult to say. After much examination the learned Judge says:—

"From these various authorities and from the other *Dhammathats* of which there are printed translations, it is clear that, when the ascending line and the descending line fail, the collateral line succeeds, and probably brothers and sisters would be preferred in certain instances to parents."

No indications are given of what this probability is, and it may be sufficient with regard to this authority to say that it does not cover the simple point now to be determined.

The case of *Mah E Dok* (18th May, 1898) was referred to. It was a case with reference to adoptive parents. Various texts were cited, concluding with Section 211 of the *Attathanyepa Vannana*, which says:—

"Where there is no younger brother or sister, then the property may revert or ascend to the elder members of the family, such as elder brothers, elder sisters, parents, or grandparents."

And the learned Judge says:—

"Although the last quoted text throws some doubt on the subject, there seems to be good authority to the rule that parents are entitled to inherit in the absence of direct descendants. There has been no argument on the point."

The "good authority" here referred to appears to have been the cases just cited, and in their Lordships' judgment the case of *Mah E Dok* does not advance the proposition in any respect.

Reference was also made to the case of *Maung Shwe Bo* (27th February, 1899) the headnote of which is this:—

"The Buddhist Law is opposed to the ascent of inheritance, but when it cannot go by descent the inheritance is allowed to ascend, first to the father and mother, and, failing them, to the first line of collaterals, and in the absence of heirs in that degree to the grandfather and grandmother and the next line of collaterals."

It is to be noted that "the respondents in this case were not represented by counsel and were unable to afford the Court any assistance in dealing with the difficult point of law involved." In those circumstances the Judge, perhaps not unnaturally, accepted the *Chit Kywe Case* as a guide, and with that their Lordships have already dealt.

It is manifest that the clear and broad issue now to be determined has never been the subject of judicial decision, and that no series of precedents can be relied upon in justification of the judgments of the

Courts below. Out of respect to the judges, and in view of the embarrassments produced by the cases cited and by the conflict among the *Dhammathits*, as well as of the importance of the general question being authoritatively settled their Lordships have thought it right to make an independent investigation so as, if possible, to clear up the whole question. In the result they are of opinion that the right of the respondent, the father of the deceased, cannot be maintained as against the right of the appellant, her sister.

Their Lordships will accordingly humbly advise His Majesty that the judgment of the Court below be reserved, and that the suit stand dismissed, the plaintiff-respondent to pay to the appellant the costs of the proceedings here and in the Courts below.

T. S. N.

Appeal allowed.

Solicitors for Appellant—Arnould & Sons.

Solicitors for Respondent—Sanderson, Adkin, Lee & Eddis.

**** A. I. R. 1914 Privy Council.**
(FROM OUDH.)

27th March, 1914.

LORDS SUMNER AND PARMOOR, SIR JOHN
EDGE AND MR. AMEER ALI.

Mt. Amir Begam—Defdt.-Appellant
v.

Syed Badr-ud-din Husain and others—
Defendants-Respondents-Plaintiffs.

* (a) *Civil P. C. Sch. 2, Para. 20*—Award without intervention of Court is valid unless corruption or misconduct of arbitrator is proved.

Where an application is made under paragraph 20 of Schedule II of the Code of Civil Procedure 1908, in respect of an award in arbitration proceedings without the intervention of the Court, the award should be filed and a decree passed in terms thereof and it is not vitiated by anything done by the arbitrator not amounting to corruption or misconduct within paragraph 15 of Schedule II of the Code. [P. 107, C. 1.]

** (b) *Arbitration—Award—Portion of award invalid*—If such invalid portion is separable, the remainder of the award is maintainable.

It is well recognised law that when a separable portion of an award is bad as for instance for being a matter clearly outside the power of the arbitrator; the remainder of the award if good, can be maintained. [P. 106, C. 2.]

** (c) *Civil P. C. Sch. 2, Para. 15*—Misconduct of arbitrator—Gross irregularity in procedure

amounting to no proper hearing, is misconduct—Onus is on party alleging the irregularities.

If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute, there would be misconduct sufficient to vitiate the award without any imputation on the honesty or partiality of the arbitrator, but the onus of proving the irregularities in procedure is on the person alleging the same.

[P. 107, C. 1.]

** (d) *Arbitration—Evidence of arbitrator is admissible when charges of dishonesty and partiality are made—But relevant evidence for such purposes should not be used for scrutinising the decision of the arbitrator on matters which are within his jurisdiction.*

An arbitrator, selected by the parties, comes within the general obligation of being bound to give evidence, and where a charge of dishonesty or partiality is made, any relevant evidence which he can give is without doubt properly admissible. It is, however necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality is not used for a different purpose; namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction as for example, the methods adopted by him in determining the quantum of his valuations and on which his decision is final. The limitation applicable to the evidence of an arbitrator as witness in a legal proceeding to enforce his award are stated in the case in *Bucclench v. Metropolitan Board of Works* (1871) S. N. L. 418 but where charges of dishonesty are made, the Court would reject no evidence of an arbitrator which could be of assistance in informing itself whether such charges were established.

[P. 108, C. 1.]

* (e) *Arbitration—Misconduct of arbitrator—Whole of a choice plot allotted to one claimant in order to avoid division which was undesirable—Arbitrator was not partial.*

Allotment of the whole of a choice portion of the property of the testator to one claimant does not amount to partiality when it is undesirable to divide the property and the only way of avoiding division was by such allotment. [P. 108, C. 2.]

* (f) *Arbitration—Jurisdiction of Court does not extend to scrutinizing estimate of value in the award.*

Apart from the charge of corruption, it is beyond the competency of the Court to scrutinize the estimate of value appearing on the face of the award. [P. 108, C. 2.]

* (g) *Arbitration—Arbitrator not maintaining Notes of the proceedings before him—That does not entitle any of the parties to the arbitration to have the award set aside.*

There is no warrant for holding that in the absence of notes of proceedings, an award should be set aside at the instance of one of the parties who made no protest until after making the award. [P. 107, C. 2.]

It is not accurate to say that although in each instance the evidence of dishonesty amounts to a mere suspicion the aggregate effect would support the charge of corruption.

DeGruyther, and *B. Dube*—for Appellant.

Upjohn, and *G. R. Lowndes*—for first Respondent.

Lord Parmoor:—This is an appeal from a decree of the Court of the Judicial Commissioner of Oudh, dated the 15th August, 1911, reversing a decree of the Subordinate Judge of Lucknow passed by him upon an application by respondent 1 for the filing of an award.

On the 6th of May, 1909, one Khwaja Farid ud-din Husain (hereinafter called the testator) died at Lucknow, leaving considerable property, and has as heirs, according to Muhammadan law, a full sister (the appellant herein), two step-brothers-respondents 2 and 3, two step-sisters respondents 4 and 5, and a widow respondent 6. Shortly before his death, the testator made a will by which he appointed respondent 1 his executor, and, as he was entitled to do by Muhammadan law, bequeathed him one third of his property. After the death of the testator disputes arose between the parties interested, and litigation was commenced. On the 6th August, 1909, the matters in dispute were referred to the sole arbitration of Munshi Sakhawat Ali under a submission of reference in the following forms:—

"Whereas there exists a dispute amongst us, the executants, regarding the estate of Khwaja Farid ud-din, deceased, and the deed of will, dated the 30th April, 1909, we, the executants, have, of our own accord, appointed Munshi Sakhawat Ali, as a referee for the purpose of settling the matter in dispute. We agree and record that the said referee may decide it in whatever way he may deem proper, we, the executants, shall remain bound by the award. Therefore we have executed these few presents by way of a deed of agreement so that they may serve as an authority."

The arbitrator entered upon the reference and published his award on the 16th July, 1910. He confirmed the appointment of respondent 1 as executor, and gave him one third of the property. The remaining property fell to be divided according to Muhammadan law. The parties were entitled in the following shares:—The appellant to a third share, the respondents 1 and 6 jointly to a moiety, the respondents 2 and 5 to a sixth share. The arbitrator then proceeded to distribute the property in proportion to the shares to which the respective parties were entitled and for this purpose to make a valuation. The property so valued

amounted in the aggregate to 91,942 rupees. There was a further item of 4,000 rupees, which was in no sense an ascertained or settled amount, but was based on a right to claim a rendition of accounts from a certain Ahmad Khan, and this item, for what it was worth was allotted to the appellant. The respondents 1 and 6 in respect of their joint half share were allotted property valued at 45,010 rupees. The appellant in addition to the above item of 4,000 rupees, was allotted property valued at 30,879 rupees, and respondents 2 and 5 were allotted property valued at 15,153 rupees. On the face of the award the distribution appears to be fairly made. So far as there is any advantage it is in favour of the appellant. This apparent advantage is referred to and explained by the arbitrator in his award.

At the time of the testator's death there was a considerable mortgage (20,000 rupees) affecting certain portions of his property. The arbitrator recognized that the allottees of the mortgaged property would be under a disadvantage with an apprehension of possible loss. He therefore decided that the debt of 20,000 rupees and its interest should, as among the parties entitled under the will, be a charge on the entire property of the testator, and proportionately on all the co-sharers, and that each co-sharer should be liable to pay in proportion to this share, and that each co-sharer should as soon as possible pay his proportionate share, both capital and interest, to the creditor. Whether this provision in the award did give full protection to the allottees of the mortgaged property, it is not within the province of their Lordships to decide. It is sufficient that matter was considered by the arbitrator and his decision cannot be questioned unless the charge of corruption or misconduct is established. The award further purported to assign specific land in the zamindari of Rasulabad by way of partition, a matter clearly outside the power of the arbitrator, and which would render his award invalid, unless this portion of his award is separable from the rest. In the opinion of their Lordships there is no difficulty whatever in separating this portion of the award from the rest. It is well recognized law that when a separable portion of an award is bad, the remainder of the award, if good, can

be maintained. In this respect their Lordships agree with judgment of the Court of the Judicial Commissioner of Oudh, and it becomes necessary to consider the grounds on which the remainder of the award has been attacked.

On the 10th June, 1910, respondent 1 made an application to the Court of the Subordinate Judge of Lucknow to file the award in Court under paragraph 20 of the second schedule of the Code of Civil Procedure (Act V of 1908). On such an application the Court, if satisfied that the matter has been referred to arbitration, and that an award has been made thereon, and that no ground such as is mentioned or referred to in paragraphs 14 and 15 is proved, shall order the award to be filed and shall proceed to pronounce judgment according to the award. Paragraph 14 states the grounds on which the Court may remit the award to the reconsideration of the same arbitrator or umpire. Paragraph 15 states the grounds in which alone an award shall be set aside. The first of these grounds is corruption or misconduct of the arbitrator or umpire. It was on this ground that the Subordinate Judge refused to order the filing of the award and disallowed the application of the respondent 1 who had been treated as plaintiff in the proceedings.

On the 7th September, 1910, issues were framed by the Subordinate Judge. The only material one is: is the award vitiated by the misconduct of the referee as alleged under the paragraphs 9 to 20 of the first defendant's (the appellant's) written statement?

The misconduct alleged against the referee was twofold:—

(1st) That the referee had acted corruptly and dishonestly in his capacity of judge.

(2nd) That the proceedings in the reference had been conducted in such a way that the matters in dispute had not been properly tried.

Their Lordships will deal first with the less important point of irregularity of procedure.

If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator. In the present case it was

alleged on behalf of the appellant that there had been no proper inquiry, since the parties had not been properly summoned to appear before the arbitrator, and the appellant had not had an opportunity of meeting the case set up by the respondent 1. The burden of proving this allegation was upon the appellant and other defendants at the trial before the Subordinate Judge. The only relevant witness called on behalf of the appellant was Shaban Ali, who admitted in cross-examination that he was sent for by the arbitrator on several occasions and questioned in respect of the value of immovable property. As against this evidence, which in itself is quite insufficient to prove the alleged irregularities, the arbitrator stated on oath that he invited all parties to put in written statements before him, but that they declined to do so; that he was never asked by any of the parties to hear oral evidence and that no oral evidence was tendered at any time, and that he got little or no assistance from any of the parties in making his inquiries. It is, however, unnecessary in their Lordships' opinion to further analyse this evidence, since they agree with the Court of the Judicial Commissioner of Oudh that the allegations of irregularity in procedure were not proved against the arbitrator, and that there is no justification for the strictures passed by the Subordinate Judge upon the conduct of the arbitrator. Further, severe comment was made that the arbitrator did not make and retain any adequate notes of the proceedings. No doubt it is generally desirable that an arbitrator should make and retain for subsequent use, if necessary, notes of the proceedings before him; but there is no warrant for holding that in the absence of such notes an award should be set aside at the instance of one of the parties, who must be held to have known the general course of procedure, and who did not make any protest until after the making of the award with the terms of which she was not satisfied.

The last point, and the most important, is the grave charge that the arbitrator acted dishonestly and with partiality in conducting the inquiry and making his award. This charge was found to be established by the Subordinate Judge. The main evidence relied upon to support this conclusion was that given by the

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arbitrator himself in cross-examination. An arbitrator, selected by the parties, comes within the general obligation of being bound to give evidence, and where a charge of dishonesty or partiality is made, any relevant evidence which he can give is without doubt properly admissible. It is, however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality, is not used for a different purpose; namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction, and on which his decision is final. The limitation applicable to the evidence of an arbitrator as witness in a legal proceeding to enforce his award are stated in the case of *Buccleuch v. Metropolitan Board of Works* (1) but where charges of dishonesty are made the Court would reject no evidence of an arbitrator which could be of assistance in informing itself whether such charges were established.

In the opinion of their Lordships the Subordinate Judge did not take sufficient care in the discrimination of the purpose for which the evidence was admissible, and utilized evidence relevant on the charge of corruption to criticize methods adopted by the arbitrator in determining the quantum of his valuations. The course adopted in the cross-examination of the arbitrator was not satisfactory. There was a prolonged and critical examination into the details of figures used by the arbitrator in making his award, but the charge of corruption was not put fairly and squarely to him, so as to enable him to give a direct answer or explanation. It is not surprising that a cross-examination so conducted should lead to a certain amount of confusion and contradiction, but their Lordships cannot find in this respect any warrant for supporting the grave charges of corruption and partiality.

The distribution and valuation of the testator's property amongst the parties entitled are stated without ambiguity on the face of the award. In the first place the arbitrator sets out the details of the property allotted to respondent 1 and in each instance his estimation of value. The first property allotted is the entire village of Mohi-ud-dinpure *alias* Hajiganj and the estimated value is 28,785 rupees.

In respect of this allotment and valuation three charges are made against the arbitrator. It is said, first, that Hajiganj was a choice portion of the property of the testator and that its allotment to respondent 1 showed partiality in his favour to the detriment of the appellant. The arbitrator's answer is that it was undesirable to divide Hajiganj and that the only way in which division could be avoided was by its allotment in entirety to respondent 1. The explanation is in itself reasonable and effectively answers the charge.

The second allegation is of under-valuation. The arbitrator is said to have dishonestly assessed this property at a low valuation intending to give an unfair preference to respondent 1. The evidence adduced in support of this charge is that the valuation was made on the *patwari's* figures to the rejection of those appearing in the accounts of the testator, the former figures giving a lower rate of profit income, and thereby diminishing the capitalized value. Their Lordships can see no reason for not accepting the arbitrator's explanation given in cross-examination. He considered the *patwari's* figures more likely to form an accurate basis for valuation than those in the private accounts, and stated that there were reasons which made him think that the private accounts were not satisfactory. This is just one of the matters on which an arbitrator is bound to exercise his discretion in estimating value, and the evidence is quite insufficient to prove that the arbitrator's choice of materials was influenced by a corrupt motive. Apart from the charge of corruption, it was beyond the competency of the Subordinate Judge to scrutinize the estimate of value appearing on the face of the award. Their Lordships can find no reason for coming to the conclusion that the basis of valuation suggested by the Subordinate Judge is preferable to that of the arbitrator.

The third charge made under the head of Hajiganj is that in the valuation, no account was taken of the zamindar's office said to be worth 500 rupees. The arbitrator's answer is that it was included as part of the village property, and that in any case it was covered by the addition of 2,000 rupees which he had made to the value of the village as a whole.

(1) (1871) 5 H. L. 418 = 27 L. T. 1 = 41 L. J. Ex. 137.

The second property allotted to respondent 1 consists of houses at Lucknow. It was said that the arbitrator had unfairly under-valued this property to the detriment of the appellant, and that he had included in his valuation a house which belonged to the appellant and not to the testator. There is no weight in the criticism made by the Subordinate Judge of the valuation of this property when the actual method adopted by the arbitrator is understood. The arbitrator having a difficulty in obtaining any satisfactory basis for fixing a valuation invited the parties to send in tenders, stating the price they would be prepared to pay for each of the houses. The only party who tendered for all the houses was respondent 1, whose tender in the aggregate amounted to a price of 11,900 rupees. The appellant sent in a tender for three of the houses at a slightly lower figure under each head, but the difference is so small as to be negligible. The arbitrator fixed the value at 11,000 rupees, reducing the tender price in the case of two houses by the comparatively insignificant sum of 50 rupees. The method of valuation adopted by the arbitrator was within his discretion, and it is impossible to find that the small alteration in the case of the two houses was inconsistent with honesty and impartiality.

It was necessary for the purpose of making his award that the arbitrator should determine whether or not to include in his distribution of property the house at Lucknow claimed by the appellant. He gave his reasons for the decision at which he arrived. He knew that the house in question had been assigned to the appellant many years ago under a deed of compromise, but found that the testator had not given up possession, always treating the house as his own and mentioning it in his will as portion of his estate. He came to the conclusion that the testator, notwithstanding the deed of compromise, had a good title by adverse possession, and that the appellant's claim could not be sustained. He may have been right or wrong in the conclusion he arrived at, but their Lordships find no warrant for the inference that he was in any way actuated by a dishonest motive. If he was wrong and the house was not the property of the testator, its inclusion in the award might be detri-

mental to respondent 1, but could have no effect whatever in defeating the title of the true owner. In addition to Hajiganj and the house property the arbitrator allotted to respondent 1 certain properties of comparatively small importance. Having regard to the decision at which their Lordships have arrived on the more important portions of the property allotted to respondent 1 it is unnecessary to follow under these heads the criticisms of the Subordinate Judge, which denote no more than a difference of opinion from the arbitrator on questions not within the jurisdiction of the Subordinate Judge to determine. No attack was made on the allocation of household furniture, cash and ornaments in Lucknow, or on their estimated value of 4,200 rupees.

Having allotted his share to respondent 1, the arbitrator next proceeds in his award to allot her share to the appellant, and to estimate the value of such share. There are three heads: the entire village of Kundri; a share in the village of Rasulabad; and a sum of 4,000 rupees. The testator's share in the village of Rasulabad was at this time subject to a considerable mortgage of 20,000 rupees, and it is alleged on behalf of the appellant that the arbitrator acted dishonestly in allotting to the appellant property subject to the disability of the mortgage; that he unfairly overruled the testator's property in Rasulabad; and that he must have known that the allocation of the sum of 4,000 rupees was practically illusory. In the allotment of the testator's share in the village of Rasulabad, the arbitrator was asked by respondents 2 to 5 to give them a share in Rasulabad, adjoined to their share in Mahal Pachhim which they already possessed. The award shows that he complied with this request. The question, therefore, arises whether there is any evidence of dishonesty in his allotting the remaining share of the testator's property in the village of Rasulabad to the appellant. The appellant was already a co-sharer in *mauza* in Rasulabad and holding a share in co-tenancy with the testator. It was, therefore, quite reasonable that the arbitrator should assign a share to the appellant of the testator's property in that village. If the allocation under the above circumstances was properly made, the disability attached to the mortgage could

not be avoided. It was necessary that some of the parties should be subject to this disability, and the matter was obviously present to the mind of the arbitrator, who in his award provided against an apprehension of loss by deciding that the mortgage-debt and its interest should be a charge on the entire property of the testator, and proportionately to all the co-sharers, each co-sharer being liable to pay in proportion to his share, and that each co-sharer should so soon as possible pay his capital and interest to the mortgagee. Their Lordships have already referred to this portion of the award, indicating their opinion that the arbitrator had dealt with the liability of the mortgaged property, providing what in his opinion appeared to be the best remedy. Under these circumstances their Lordships can find no evidence for the alleged dishonesty in the allotment of a share of the mortgaged property to the appellant, and agree in the decision of the Court of the Judicial Commissioner.

Their Lordships have found some difficulty in understanding on what ground the Subordinate Judge has based his finding that the Rasulabad property was dishonestly over-valued. In his criticism on the valuation he states that the referee has valued the entire estate of the deceased at 95,042 rupees, but this in itself is an error, since it is clear on the face of the award, that the estate was valued for distribution at 91,042 rupees, and that the additional sum of 4,000 rupees was only thrown in as an item which might possibly be recovered on a claim for a rendition of accounts from Ahmad Khan. This initial mistake affects the subsequent inference, and their Lordships can find no evidence of dishonesty in the detailed criticism of the arbitrator's figures. The Subordinate Judge places considerable weight on the allotment of 4,000 rupees to the appellant as an element of misconduct in the arbitrator. It was objected that this was at best a doubtful item and ought not to be estimated in calculating the value of the appellant's share. The answer to this objection appears on the face of the award. In calculating the value of the appellant's share of the testator's property, this sum was not taken into account, but thrown in as an additional item after the appellant had been allotted

property estimated at 30,879 rupees, in itself rather more than her third share of the valued property.

Ahmad Khan was a Karinda in the employ of the testator, and had been collecting his rents. It was alleged before the arbitrator that this man had money in his possession which was owing to the estate, and for which he had not accounted. Some figures were placed before the arbitrator, but there was no reliable evidence either of liability or of amount. Ahmad Khan refused to appear before the arbitrator to give any explanation of his accounts, and he was not called at the trial before the Subordinate Judge. The respondent (1) had given Ahmad Khan acquittance for any sums that might be due to him, and the arbitrator was informed by Mr. Muhammad Fasih, a pleader, and the son-in-law of the appellant, that he, too, had given Ahmad Khan discharges as he desired to get Ahmad Khan in his power to support the appellant's claim for mutation. Under these circumstances, what was the arbitrator to do? If he had made no reference to the matter in his award no question would have arisen, and, on the face of the award, the appellant would have had a full one-third share of the valued property. The course he took was evidently intended to be in favour of the appellant for what it was worth, and the finding of the Subordinate Judge that there was evidence of dishonesty appears to be founded on a misapprehension of the terms of the award in relation to the distribution of this item.

It was argued before their Lordships by counsel for the appellant that, although in each instance the evidence of dishonesty might not amount to more than a case of suspicion, the aggregate effect would support the charge of corruption, since in every instance the decision was given in favour of respondent 1, and to the detriment of the appellant. In their Lordships' view, this is not an accurate summary, but in any case, there would be no sufficient ground to infer such a grave charge as dishonesty and partiality against an arbitrator unless much stronger evidence was adduced in support of the particular instances relied upon than was forthcoming in the present case. It is just to the arbitrator to say that, in their Lord-

ships' view, the charges of dishonesty and partiality have entirely failed.

The Lordships agree with the judgment of the Court of the Judicial Commissioner of Oudh, and will humbly advise His Majesty to dismiss the appeal with costs.

T. A. R.

Appeal dismissed.

Solicitors for Appellant — Douglas Grant.

Solicitors for Respondents — Watkins and Hunter.

A. I. R. 1914 Privy Council.

(FROM CALCUTTA)

4th March, 1914.

LORDS SHAW AND MOULTON AND
MR. AMEER ALI.

Arthur Henry Forbes—Appellant

v.

Maharaj Bahadur Singh and others—
Respondents.

(a) *Bengal Patni (Regulation, 8 of 1819)*—*Regulation is exempt from Bengal Tenancy Act, —Dar-patnidars who have deposited the arrears of rent and got possession under the Patni Regulation are entitled to be in possession, exempted from any proceeding under the Bengal Tenancy Act.*

A zamindar sold his zamindari and after the sale brought a suit against the Patnidar for arrears of rent accrued due before the sale, and obtained a decree. After his death his trustees sought to execute this decree. But in the meanwhile the patnidar having fallen in arrears to the purchaser the purchaser instituted proceedings in the Court of the Collector for sale of the patni. At this sale the dar patnidars, the appellants deposited the arrears and got possession of the patni. Now when the trustees of the deceased vendor sought to execute his decree and obtained an order for sale of the patni under Section 165 of the Bengal Tenancy Act the appellants instituted a suit for an injunction restraining the trustees from proceeding with the execution of the decree.

Held, that the Patni Regulation was a special and self contained enactment which was exempted from the operation of the Bengal Tenancy Act, 1885. And the dar-patnidars by depositing the arrears of rent with the Collector, when the patni was brought to sale got under the Patni Regulation a statutory salvage lien. Therefore they had a right to hold the patni Taluk executed from any proceeding under the Bengal Tenancy Act.

(b) *Bengal Tenancy Act (1885) Sec. 65—S. 65 applies only where relation of landlord and tenant is subsisting—Bengal Tenancy Act S., 48.*

The scope of the Act shows that for Section 65 to operate there must be the relation of landlord and tenant subsisting and Section 148 cl. (h) provides that the right to apply for the execution of a decree for arrears is attached to the status of the

decree-holder *qua* landlord. Therefore the right to bring the tenure or holding to sale under Section 65 appertains exclusively to the landlord; and a person to whom certain rents are due and who obtains a decree therefore after he has parted with the property in which the tenancy is situated cannot have such right. *Khetra Pal v. Krityamoni Dassi*, 33 Cal. 566 (F. B.) distinguished.

(c) *Bengal Patni Regulation (8 of 1819)—Incidents of Patni tenure summarised —1 and-lord and Tenant.*

A Patni taluk is a permanent, inheritable and transferable tenure which the zamindar may create over the whole or part of his estate, while the patni talukdar has a similar right to let the entire property held by him in patni or parcels to subordinate talukdars called dar patnidars. And this process of sub-infeudation may, so far as the law is concerned, be carried down to several lower degrees. In the case of these tenures the zamindar has a right to apply to the Collector to put up the patni taluk to sale for arrears of rent and the sale has the effect of cancelling all under tenures; but the subordinate tenure-holders have the right to deposit in the Collector's Court the arrears of rent and to be put in possession of the defaulting superior tenure for the satisfaction of the deposit made by them. The same right which the zamindar possesses for the realisation of his rent, with the correlative right on the part of the subordinate tenure-holders of saving the superior tenure from sale is given to them in succession.

[P. 112, C. 1.]

(d) *Bengal Tenancy Act—General scope indicated—Tenants having permanent interests were protected from being ejected for arrears of rent—At the same time rent was made a first charge on the holding which was made liable to be sold in execution of a decree for arrears of rent.*

There exist many permanent, heritable and transferable tenures in Bengal which do not come within the purview of Regulation 8 of 1819, and which have no relation to Patni taluks. The incidents of these tenures are governed by the Bengal Tenancy Act, passed in 1885 to regulate, subject to certain exceptions the relations in general between landlord and tenant.

The Bengal Tenancy Act whilst it protected permanent tenure-holders and other tenants having similar permanent interests against ejectment for arrears of rent, gave to the landlords certain rights which they either did not possess before or possessed only in a qualified form. One was the right to bring to sale the tenure or holding in execution of a decree for arrears of rent, and the rent was to be a first charge on the holding.

DeGruyther and A. M. Dunne—for Appellant.

Robert, Finlay and Ross—for Respondents.

Mr. Ameer Ali :—This appeal, which is from a judgment and decree of the High Court of Calcutta, dated the 8th of April, 1903, raises certain questions of particular importance under the Rent Law of

Bengal, for the proper apprehension of which it is necessary to set out in some detail the facts of the case. The zamindari of Lot Saifganj, situated in the district of Purneah, was owned at one time by a rich zamindar of the name of Roy Dhanpat Singh, since deceased. The estate, however, was settled in *patni*, and has been held for some years past by the defendant Chatrapat Singh as the *patni talukdar*; Chatrapat on his side, has settled the *patni* tenure in several parcels with subordinate tenure-holders called *dar-patnidars*. Two of these *dar-patnis* are held by the plaintiff-appellant. These tenures are special to Bengal, the Sonthal Pergunas and certain parts of Chota-Nagpur, and their incidents are governed by Regulation 8, of 1819, commonly called the Patni Regulation. To some of these incidents reference will be made in the course of this judgment.

But it may be conveniently premised here that a *patni taluk* is a permanent, inheritable and transferable tenure, which the zamindar may create over the whole or part of this estate, whilst the *patni talukdar* has a similar right to let the entire property held by him in *patni* or in parcels to subordinate talukdars called *dar-patnidars*. And this process of sub-infeudation may, so far as the law is concerned, be carried down to several lower degrees. In the case of these tenures the zamindar has a right to apply to the Collector to put up the *patni taluk* to sale for arrears of rent, and the sale has the effect of cancelling all under-tenures; but the subordinate tenure-holders have the right to deposit in the Collector's Court the arrears of rent and to be put in possession of the defaulting superior tenure for the satisfaction of the deposit made by them. The same right which the zamindar possesses for the realization of his rent, with the correlative right on the part of the subordinate tenure-holders of saving the superior tenure from sale, is given to them in succession.

On the 27th of June, 1893 Dhanpat Singh transferred the zamindari, subject of course to Chatrapat's *patni*, to a Hindu lady, Bhagwanbati Chowdhraïn, who has unquestionably been in possession of the estate since her purchase.

It appears that certain arrears of rent in respect of the *patni* had become due before the sale to Bhagwanbati Chowdh-

raïn. For these arrears Dhanpat Singh brought a suit in the Civil Court on the 21st September, 1893. The final decree in this action was passed by the High Court on the 10th of July, 1896. Nine days after, Dhanpat Singh executed a deed of trust by which he assigned to the defendants 2 to 4 in trust for the defendant Maharaj among other properties the decree for arrears of rent.

Dhanpat Singh died shortly after, leaving Maharaj his only son and heir.

In 1897 the trustees proceeded to execute the decree against Chatrapat but were met with various objections on his part which were finally overruled by the High Court in 1899.

In the meantime Chatrapat had fallen into arrears in respect of the *patni* rent payable to the Chowdhraïn; and that lady had instituted in the Court of the Collector of Purneah the special proceedings under Regulation 8 of 1819 for the realization of her dues. The defaulting tenure was accordingly advertised for sale on the 14th of May, 1901. The plaintiff-appellant thereupon deposited the amount of the arrears in the Collector's Court and was put by him in possession of the *patni taluk*. Since then he has been, and still is, in possession of the superior tenure paying rent to the zamindar and realizing the rents due to the *patni talukdar* from the subordinate holders.

The trustee defendants, having obtained the decision of the High Court that they were entitled to execute Dhanpat Singh's decree, applied for the sale of the *patni taluk* under Section 163 of the Bengal Tenancy Act. It is to be observed that a sale held under this section does not give power to the decree-holder to annul "notified and registered incumbrances." The plaintiff thereupon preferred a claim under Section 278 of the Civil Procedure Code of 1882, which however, after some protracted proceedings, was withdrawn. Apparently a sale under Section 163 was held, but it did not fetch a sum sufficient to liquidate the arrears and costs, and the defendants then applied for a sale under Section 165 under which the decree-holder has the power to annul all incumbrances including under-tenures. On this application the 6th of August, 1906 was fixed for the sale of the *patni*. The present suit was then brought by the plaintiff on the 9th of July in the

Court of the Subordinate Judge of Purneah to restrain the defendants from proceeding with the sale.

It should be noted here that there exist many permanent, heritable, and transferable tenures in Bengal which do not come within the purview of Regulation VIII of 1819, and which have no relation to *Patni Taluks*. The incidents of these tenures are governed by the Bengal Tenancy Act passed in 1885, to regulate, subject to certain exceptions to which, attention will be drawn, the relations in general between landlord and tenant.

The Bengal Tenancy Act of 1885, whilst it protected permanent tenureholder and other tenants having similar permanent interests against ejectment for arrears of rent, gave to the landlords certain rights which they either did not possess before or possessed only in a qualified form. One was the right to bring to sale the tenure or holding in execution of a decree for arrears of rent. Section 65, which declares this liability of the defaulting tenure, also declares that "the rent shall be a first charge thereon." It is round these words that the controversy between the parties is mainly centred. Their Lordships say mainly, because there is another question of vital importance in this case which relates to the applicability of the provisions of the Bengal Tenancy Act to *patni tenures*.

The defendants in their endeavours to bring Chatrapat's *patni taluk* under the provisions of Section 165 of the Tenancy Act, contend that as the relationship of landlord and tenant existed between Dhanpat Singh and Chatrapat when the rents became due, the decree obtained by him became by virtue of Section 65 a first charge on the tenure. The plaintiff's contention, on the other hand, is that as Dhanpat Singh had parted with his interest in the zamindari before the institution of his suit for arrears, the decree of which execution was sought was not a rent decree within the meaning of Section 65.

The Subordinate Judge has upheld the plaintiff's contention, and granted him an injunction restraining Maharaj Bahadur and the trustee defendants, who are called in the suit "first party defendants," from executing their decree of the 10th of July 1896, against the *patni* under the provisions of the Bengal Tenancy Act. His

decision has been reversed by the High Court on appeal and the plaintiff's suit been dismissed with costs. The learned Judges considered that the decree being for rent the mere fact that the zamindar had sold the estate after it became due does not affect his right to "a first charge." At least that is what their Lordships understand to be the meaning of the learned Judges in the following passage of their judgment:—

"The decree of the 10th July, 1896, is a decree for rent. Rai Dhanpat Singh was the landlord at the time when the rent he sued for accrued due. His claim for rent when found due became a 'first charge' on the *patni*. There is nothing in the law which disentitles him to a first charge, because after the accrual of the rents he sued for, he parted with his interest in the zamindari."

This conception is further developed at a later stage of their judgment, where they say as follows:

"Now, no doubt, the decision of this Full Bench does not deal with a case such as the present in which the landlord had parted with his interest before he instituted his suit for rent, but it would seem to follow that if he can execute a decree for arrears of rent as a rent decree after he has parted with his interest as landlord, he can also do so when he obtained his decree for rent, even after he had parted with his interest in the property. The character of the decree a suitor obtains, depends on the nature of the claim and of his right to the relief sought for, and is not altered by any change in his position which may have taken place subsequent to the accrual of his right to sue."

Their Lordships cannot help observing that the learned Judges have fallen into an error in drawing an inference of law in support of their conclusion from a decision which was obviously based on facts different from those with which they had to deal. In the Full Bench case of *Khetra Pal Singh v. Kritarthamoyi Dassi* (1), the landlord did not part with the property and put an end to the relationship of landlord and tenant until after the decree in his suit for rent; whereas in the present case he transferred his interest to Bhagwanbati Chowdharain before his suit for the arrears. The broad question, however, for determination in this appeal is whether the special right created in favour of the landlord under Section 65 can be claimed also by one who has parted with the property which gives this right and to which it is attached.

There is no doubt that there is a divergence of opinion among the Judges of

(1) [1906] 33 Cal. 566=3 C.L.J. 470=10 C.W.N. 547 (F.B.).

the High Court of Calcutta with regard to the construction of Section 65. The section itself runs as follows:—

"Where a tenant is a permanent tenure holder, a raiyat holding at fixed rates or an occupancy raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon.

It is not a happily worded section, and the words "and the rents shall be a first charge thereon," seem, from their collocation, to have been inserted as an afterthought without sufficient consideration of their applicability to the rest of the provisions contained in the section. They give no indication as to when it becomes a "first charge." Does it become a first charge from the nature of the claim, as some of the learned Judges seem to imagine, or does it become a first charge, after it has been ascertained and made the subject of a decree? Again, the section does not sufficiently indicate at whose instance the tenure or holding shall be liable to sale in execution of a decree for rent thereof though from the reason of the thing it is obvious that it must be at the instance of the landlord.

These questions cannot, therefore, be answered by a reference to the mere section itself, to understand its meaning, their Lordships apprehend, the general scope of the Statute as well as of the chapter in which it occurs must be taken into consideration. The Act as stated in the preamble was designed "to amend and consolidate certain enactments relating to the Law of Landlord and Tenant." The words "Tenant," "Landlord," and "Rent," are carefully defined. "Landlord" is declared to mean "a person immediately under whom a tenant holds, and includes the Government," whilst "rent" is declared to mean "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant." Chapter VIII embodies the "general provisions as to rent." After dealing with "rules and presumptions as to amount of rent," "the alteration of rent," "deposit of rent," in Court when the landlord refuses to receive payment, it treats of "arrears of rent." The governing idea throughout the multifarious provisions contained in Chapter VIII to regulate the respective rights and obligations of landlords and tenants, is the sub-

sistence of the relationship that gives rise to those rights and obligations.

Section 65 declares that a certain class of tenants shall not be liable to ejectment for "arrears of rent," but that their tenure or holding "shall be liable to sale in execution of a decree for the rent thereof." Section 66 provides that in the case of other tenants not coming within the purview of Section 65, the landlord "may institute a suit to eject" the defaulting tenant. The two sections taken together cover practically the remedies provided by law for the landlord to recover arrears of rent. One section is the exact corollary of the other. The right to proceed to sale in one case, in the other to eject, is dependent on the existence of the relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced. A reference to Section 148, Clause (h), clearly shows that the right to apply for the execution of a decree for arrears was attached to the status of the decree-holder *qua* landlord. It declares that

"notwithstanding anything contained in Section 232 of the Civil Procedure Code in application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest has become and is vested in him."

The prohibition contained in this section refers to decrees obtained by the landlord under Section 65. To acquire the right which the section gives not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure must have the landlord's interests "vested" in him. In other words, the right to bring the tenure or holding, as the case may be, to sale exists so long as the relationship of landlord and tenants exists.

It seems to their Lordships clear on an examination of the different sections bearing on the subject that the right to bring the tenure or holding to sale under Section 65 appertains exclusively to the landlord; and that a person to whom certain rents are due, and who obtains a decree therefor after he has parted with the property in which the tenancy is situate, has no such right. The contrary view, their Lordships think, would give rise to a very anomalous situation. A zamindar to whom certain arrears are due, as in the present case, may sell his property, without assigning, for purposes of his own,

the back-rents as he is entitled to do; he may then sue for those back-rents; before any decree is made in this suit, the tenant falls into arrears to the new landlord who brings a similar suit. Both the ex-landlord and the present landlord obtain decrees for their respective arrears. In whose decree and on whose application is the tenure to be sold? The question admits of only one answer—that it is the existing landlord alone who can execute the decree; the ex-landlord is an outsider, and, whilst he can execute his decree against the debtor as a money-decree, he has no remedy against the tenure itself.

The learned Judges of the High Court seem to think that either from the nature of the debt being arrears of rent, or the decree being for arrears of rent, the tenure becomes *ipso facto* hypothecated so to speak for the debt; and that consequently the person to whom the debt is due, although he has ceased to be the landlord, and is to all intents and purposes, so far as other rights and obligations under the law are concerned, a total stranger to the property with which those rights and obligations are inseparably connected, he has the special remedy given to the landlord to recover arrears attached to the tenure. This conception of the legal position seems to their Lordships untenable, for the charge created by Section 65 is clearly in favour of the landlord.

There is another equally fatal objection to the application of the contesting defendants to bring to sale the *patni tenure* in execution of Dhanpat Singh's decree.

The Patni Regulation is a self-contained Statute. It lays down certain well-defined rules for the realisation by the zamindar of arrears of rent from a tenure-holder; it makes the tenure primarily liable, and it gives to the zamindar the right of applying to the Collector for the periodical sale of defaulting taluks.

Section 8 provides for the manner in which the zamindar, that is, "the proprietor under direct engagement to Government," shall be entitled to apply for the sale of these tenures.

Section II declares that,

"any *taluk* or saleable tenure that may be disposed of at a public sale, under the rules of this Regulation, for arrears of rent due on account of it, is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives or assignees."

It is unnecessary to refer to the rest of this section for the purposes of this judgment.

Section 13 provides the method by which the "holder of a *taluk* of the second degree" may save his tenure "from the ruin that must attend" the sale of the superior tenure.

Sub-section (2) declares:—

"Whenever the tenure of a *talukdar* of the first degree may be advertised for sale in the manner required by the second and third clauses of Section 8 of this Regulation, for arrears of rent due to the zamindar the *talukdars* of the second degree, or any number of them, shall be entitled to stay the final sale, by paying into Court the amount of balance that may be declared due by the person attending on the part of the zamindar on the day appointed for sale; in like manner they shall be entitled to lodge money antecedently, for the purpose of eventually answering any demand that may remain due on the day fixed for the sale, and, should the amount lodged be sufficient, the sale shall not proceed, but, after making good to the zamindar the amount of his demand, any excess shall be paid back to the person or persons who may have lodged it."

And sub-Section (4), after referring to certain conditions which it is unnecessary to consider here, declares that

"such deposit shall not be carried to credit in, or set against, future demands for rent, but shall be considered as a loan made to the proprietor of the tenure preserved from sale by such means, and the *taluk* so preserved shall be the security to the person or persons making the advance, who shall be considered to have a lien thereupon, in the same manner as if the loan had been made upon mortgage; and he or they shall be entitled, on applying for the same, to obtain immediate possession of the tenure of the defaulter, in order to recover the amount so advanced from any profits belonging thereto."

It will be seen, therefore, that the appellant in this case, by his admitted deposit of the arrears for which the superior tenure was advertised for sale at the instance of the Chowdhraiz zamindar, acquired the special lien expressly created by the Regulation which may well be called a statutory salvage lien arising not from any implication of the law but under the express directions and declarations of the Act.

Regulation VIII of 1319 being thus, as already observed, a self-contained Act embodying the rules relative to the rights of zamindars and *patni talukdars*, the Legislature in enacting Act VIII of 1885 excluded in express terms from the operation of the Tenancy Act the special legislation relating to *patni tenures*. Section 195 of Act VIII of 1885 declares

(omitting the immaterial portions) that "nothing in this Act shall affect . . . any enactment relating to *patni tenures*, so far as it relates to those tenures.

The plaintiff's right to hold the *patni talook* exempt from any proceeding under the Tenancy Act, is founded on steps taken by him under the Patni Regulation.

For these considerations, their Lordships are of opinion that the judgment and decree of the High Court should be set aside, and the decree of the Subordinate Judge restored. The first party defendants, the contesting respondents, must pay the costs of this appeal and of the appeal to the High Court.

And their Lordships will humbly advise His Majesty accordingly.

T. S. N. *Appeal allowed.*

Solicitors for Appellant:—T. L. Wilson & Co.

Solicitors for Respondents:—Downer and Johnson.

A. I. R. 1914 Privy Council.

(FROM LOWER BURMA.)

7th April, 1914.

LORDS SHAW, SUMNER AND PARMOOR,
SIR JOHN EDGE AND MR. AMEER ALI.

Channing Arnold—Appellant

v.

King-Emperor.—Respondent.

Privy Council Appeal No. 26 of 1913.

(a) *Privy Council—Criminal Trial*—*The Privy Council is not a Court of criminal appeal—Its practice in criminal cases is to interfere only, when an accused has been denied his elementary rights or there has been a violation of the natural principles of justice—Misdirection to jury, which misdirection it is uncertain did or did not affect the jury's mind—The Privy Council cannot assume or affirm miscarriage of justice on account of such misdirection and interfere.*

The question is not truly one of jurisdiction. The power of His Majesty under his Royal authority to review proceedings of a criminal nature, unless such power and authority have been parted with by statute, are undoubted. Upon the other hand there are reasons both constitutional and administrative which make it manifest that this power should not be lightly exercised. The overruling consideration upon the topic has reference to justice itself. If throughout the Empire it were supposed that the course and execution of justice could suffer serious impediment, which in many cases might amount to practical obstruction, by an appeal to the

Royal Prerogative of Review on judicial grounds then a severe blow would have been dealt to the ordered administration of law within the King's dominions.

The Privy Council is not a Court of criminal appeal. It is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law unless there has been such an interference with the elementary rights of an accused as has placed him outside the pale of law or within that pale there has been a violation of the natural principles of justice, so demonstratively manifest as to convince the Privy Council first, that the result arrived at was opposite to the result which the Privy Council would have reached, and secondly that the same opposite result would have been reached by the local tribunal also, if the alleged defect or misdirection had been avoided. The extreme case in which the interference of His Majesty will be advised is a case where it is established demonstrably that justice itself in its very foundations has been subverted and it is therefore a matter of general Imperial concern that by way of an appeal to the king it be then restored to its rightful position in that part of the Empire.

Where there has been a misdirection in any criminal case leaving it uncertain whether that misdirection did or did not affect the jury's mind, then in such a case to assume or affirm miscarriage of justice, would be to convert the Privy Council into a Court of Criminal Review for the Indian and Colonial Empire, which it is not.

Lord Watson's observations in *Dillet's* case interpreted.

(1862) 1 Moo. P.C. (N.S.) 272, (1863) 1 Moo. P.C. (N.S.) 299, (1887) 12 A.C. 459. Referred.

(1894) A.C. 57, 36 Mad. 501, (1914) A.C. 221. distinguished.

Decisions in regard to the rules and procedure of the Court of Criminal Appeal in England do not apply to the Privy Council. In the region of fact, unless something gross amounting to complete misdescription of the whole bearing of the evidence has occurred, the Privy Council will not interfere.

** (b) *Criminal P. C., S. 297—Charge to the jury—Defamation—If the question to be considered by the jury was not removed from their province, narration of facts in such a way in the charge to the jury as to leave an impression that the complainant was not so bad as the libel alleged him to be, is not by itself mis-direction.*

Objection was taken that the narrative of the Judge must have left the impression on the mind of the jury that the complainant had not acted wickedly as the libel for which the accused was being prosecuted, alleged.

Held:—A charge to the jury must be read as a whole. If there are salient propositions of law in it these will of course be the subject of separate analysis. But in a protracted narrative of fact the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would however not be in accordance with usual or

good practice to treat such cases as cases of misdirection if upon the general view taken the case has been fairly left in the jury's Province.

**** (c) Penal Code, S. 499—Journalist—Privilege—No privilege attaches to the journalist's position and apart from Statute Law, his range of criticism is no wider than that of any citizen—Defamation.**

The freedom of the journalist is an ordinary part of the freedom of the subject and to whatever length, the subject in general may go, so also may the journalist, but apart from Statute Law his privilege is no other and no higher. The range of his assertions, his criticisms or his comments is as wide as, and no wider than that of any other subject.

(d) Penal Code—S. 499—9th exception, imputations made in good faith for protecting one's own interest or that of the public—S. 52, "Good faith" does not attach to belief or action done without due care and attention.

The appellant wrote an article in the *Burma Critic* to the effect that Mr. Andrews, a District Magistrate prostituted justice by questionable means. This article was based on facts partly declared to be false by the Government of Burma, to the knowledge of the appellant and partly on facts the truth of which he did not care to enquire: And when the falsehood of the latter set of facts was convincingly brought to his knowledge, he not only did not apologise but conducted the trial to the finish suggesting throughout the trial that the facts were true, though he did not set up the legal defence of "justification by truth."

Held, that in these circumstances he cannot be taken to have made the comments contained in the article in "Good faith" as the expression is defined in Section 52 of the Indian Penal Code.

**** (e) Penal Code, S. 499—Public acts of Judge enjoy no special exemption from adverse criticism—Defamation**

It is a dangerous doctrine that some privilege or protection attaches to the public acts of a Judge which exempts in regard to these from free and adverse comment. He is not above criticism; his conduct and utterances may demand criticism. Freedom would be seriously impaired if judicial tribunals were outside of the range of such criticism.

(f) Criminal P. C., S. 297—Defamation—Accused not formally asserting truth of libel, but repeatedly attempting to persuade jury that libel stated the truth—Judge's narrative calculated to check the effect of this improper use of procedure is not misdirection.

While the truth of the libels was not asserted formally and while the admission of their falsehood was formerly granted an endeavour was repeatedly made to withdraw all this and to persuade the jury to take all that was asserted as true.

Held, that this was an improper use of the procedure.

Held, further that such things may occur; but it is the duty of Judges to put what check they can upon them, and in the present case wherein the narrative of facts given in the Judge's charge to the jury led to the conclusion that the matter of the libels was not true, the Judge must be held to have done his duty with propriety.

Robert Finlay, D. A. Wilson and A. Page—for Appellant.

E. Richards and A. M. Dunne—for the Crown.

Lord Shaw :—By leave granted by His Majesty in Council this appeal is brought from a conviction of and sentence upon the appellant by the Chief Court of Lower Burma, pronounced on the 19th October, 1913. The charge was one of defamation or criminal libel, and the prosecution was laid under the 21st Chapter of the Indian Penal Code. In that Chapter Section 499 gives a definition of defamation, and sets forth categorically no fewer than ten exceptions, any one of which forms a proper defence to the charge. By Section 500 it is provided that the punishment of defamation shall be "simple imprisonment for a term which may extend to two years, or with fine, or with both."

The appellant was charged with having defamed Mr. G. P. Andrew, Deputy Commissioner and District Magistrate of Mergui, by the publication of two articles in the *Burma Critic*, a Rangoon newspaper on the 28th April, 1912. These articles were entitled "A Mockery of British Justice."

Mr. Arnold has had experience as a journalist; and it appears from the proceedings that he was at one time the Chief Editor of the *Rangoon Times*. He ceased to be editor of that journal in the end of September, 1911, and in January 1912, he was registered as one of the proprietors and the editor of the *Burma Critic*. The articles bear witness to the writer's possession of great invective and declamatory power; and it ought to be said at once that his motives have not been challenged except in so far as that is necessarily involved in the contention that he published serious libels and did so otherwise than in good faith.

The proceedings against him were initiated on the 11th June, 1912, by Mr. Andrew, the District Magistrate already mentioned. On the 3rd October, 1912 the trial of the case began before *Sir Charles Fox*, the Chief Judge, with a jury. It was protracted and lasted from the 3rd to the 19th October. On the latter date the jury returned a unanimous verdict of guilty, and a sentence of one year's simple imprisonment was pronounced. The Board were informed that

after undergoing four months' imprisonment the remainder of the sentence was remitted.

Their Lordships listened to a lengthy argument in support of this appeal, during which the entire history of three stages of proceedings or sets of circumstances was discussed. These were, first, the details of the conduct of one McCormick, a planter, who was charged with having abducted and committed rape upon a Malay girl of about 11 years of age; secondly, the conduct and proceedings of Mr. Andrew, as District Magistrate at the investigation which was conducted before him into this charge and which ended in his declining to commit McCormick for trial; and, thirdly, the proceedings at the trial in the present case.

From one point of view the discussion might have been greatly shortened by the exclusion of the consideration of the two first elements mentioned. But their Lordships were unwilling, in view of the importance which is said to attach to the appeal, to adopt any step which would appear to prevent the fullest statement by the appellant's counsel of his entire position. And secondly, it has to be admitted that Sir Robert Finlay was justified in his observation that, although there was no justification of the libel pleaded still the circumstances demanded a prolonged investigation on this other issue, namely, whether the appellant, from the material placed before him when he wrote the libel, was acting in good faith. If he did so act he would stand within the exception under the Indian Penal Code, and the libel, otherwise unjustified, would be excused by Statute. In these circumstances the fullest investigation was permitted to take its course.

It is now important to see what are the provisions of the Penal Code which apply to the case.

"Whoever," says Section 498 of the Indian Penal Code, "by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the case herein-after excepted to defame that person." Of the ten exceptions under the section

three were mentioned. The first exception is in these terms:

"It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact."

It was admitted by the counsel for the appellant at their Lordships' bar that their client claimed no benefit under this exception he did not suggest that the series of libels or any one of them was true; on the contrary all of them in so far as they were assertions of fact were admitted to be false.

In point of form the same course was taken in the Court below. But while this was so and while the plea of veritas was not openly or plainly made, their Lordships regret to observe that surreptitiously it did not appear and reappear in the case by way of repeated innuendo. It may be as well to bring this matter in at once. In Sir Charles Fox's charge to the jury this passage occurs:

"You will observe that under the first exception the only question apart from the question of the public good that could arise was whether what had been said was true or not. Now it is noticeable that the defence does not rely on that exception although up to the end we have had it reiterated that what was said was true."

Upon being questioned, the learned counsel for the appellant frankly admitted that the exception was not in point of fact pleaded as a defence, and their Lordships do not understand that they disputed that the learned Chief Judge's statement of what occurred at the trial by reiterated innuendo was correct. It was open to the appellant to defend his utterances as true. But he declined to take that course. Their falsehood stood as an admission in the case, the words themselves being so plainly of a libellous character. This part of the case, may accordingly be definitely dismissed.

The second exception is in these terms:

"It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character so far as his character appears in that conduct, and no further."

The distinction between this and the first exception is that the former deals with allegations of fact, and this second exception deals with the expression of opinion. This also has nothing to do with the case as it now stands, because it was, as it must be admitted

that the articles did not confine themselves to expressing an opinion as to the conduct of Mr. Andrew, but in much detail made definite defamatory allegations of fact against him.

It is accordingly upon the ninth exception that the determination of the present appeal solely depends. That is in these terms:—

“It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.”

In connection with this exception it is necessary to take its language along with that of Section 52 of the Code, which is to this effect: “Nothing is said to be done or believed in good faith which is done or believed without due care and attention.”

Notwithstanding the elaboration of the arguments and the introduction of much matter affecting the conduct of McCormick and the conduct of Mr. Andrew, it was accordingly this question, and this question only, which the jury charged by Sir Charles Fox had to try, namely, whether in publishing the libels admitted to be false Mr. Arnold did so in good faith because he believed them to be true, having given due care and attention to seeing that they were so. If the jury were satisfied that he did give that due care and attention and that he acted in good faith, then the exception formed a good defence, and the accused would be found not guilty. If, on the other hand, they were not so satisfied, then no course, according to the Indian criminal law and the Indian Evidence Act, was open to them but to negative the exception and to find the accused guilty. No question is made that each of these propositions is sound.

It is contended, however, by the appellant that in the course of the charge there was misdirection by the Judge, and that the jury's minds were diverted from this which it is admitted was the true and only issue, to other questions. What were these? They were the very things which the prisoner's counsel had throughout the trial insisted on introducing, namely, the question of the conduct of McCormick and of Mr. Andrew, the narrative as to Andrew being accompanied by the suggestion that it was after all indefensible and corrupt. Their Lordships recognise

that this mode of conducting the defence, which it appears to have been difficult to repress, was not unlikely to lead to confusion, but it is at least satisfactory to find that the learned Judge in charging the jury made no mistake in stating what the true issue was. It is admitted by the appellant's counsel that this is so. “What you will have to consider,” said the learned Judge to the jury, is “whether the imputations in these articles were published in good faith, after due care and attention had been exercised on the part of the writer of them. What is ‘due care and attention’ must depend on the circumstances of each particular case.” It is also fair to the learned Judge to say that, while he felt constrained—a course which, in view of the conduct of the defence, is not to be wondered at—to go with some fulness into a narrative of fact, he concluded his charge to the jury by bringing their minds directly back to the exact issue which they had to try. He did so in this language:

“It is now for you to consider these matters, and to decide whether the accused has satisfied you that he used the reasonable care that he ought to have used. If you are satisfied that he did, and that he did not overstep the bounds of law as I have explained the law to you, then you must acquit him, but if he has not satisfied you that he has exercised such due care and attention before he committed himself to paper in this way, then it is your bounden duty to convict him.”

Before the exception and the alleged misdirection of the jury are dealt with, it is expedient to state what the libel contained. Being headed “A Mockery of British Justice,” after a considerable amount of inflammatory matter, it proceeds to “speak out against those officials who have forgotten their duty and have dared to trifle with the fair fame of England.” Having made these very serious allegations the appellant added:

“The facts before us indicate that he (Mr. Andrew) conspired with Mr. Finnie to Burke the case; that he conducted it *in camera*; that he refused to heed the protest of the complainants that the interpreter employed was a paid parasite of McCormick, and did, in fact, deliberately mistranslate; that of the witnesses for the prosecution only those called by the District Superintendent of Police, and not even all of them, were allowed to give evidence; that in a word the whole enquiry was an outrageous make-believe and a mockery of what is nominally representative the fair play and judicial honour associated with the name of England. By what looks like the meanest of tricks, the unfortunate complainants

were unrepresented by any lawyer at this judicial farce."

It would serve no good purpose to cite further from the libels; they mention disgusting details and incriminate other officers besides Mr. Andrew, as engaged, in a corrupt plot. They contain not one, but a series of libels of the grossest character. These libels were at least seven in number. First of conspiracy with Finnie to prostitute justice by saving Mc Cormick, secondly of having apparently knowingly and as part of the partisanship, bailed out McCormick for a non-bailable offence. Thirdly, of having misled the Malay girl, her parents and friends, by leaving them without professional advocacy, which they had been led to expect. Fourthly, of having perverted the course of truth by a partisan interpreter. Fifthly, of having tried the case *in camera*. (Very little was made of this in argument). Sixthly, of not having called certain witnesses in the inquiry; and seventhly of Mr. Andrew having heard the case knowing that certain people objected to his doing so.

Of the libels the first was the real basis of all. It imputed corruption. Several of the others might not appear but for their resting upon that basis of corruption to be of so serious a type. But in their Lordships' opinion this cannot be said of the third and fourth, for if it were true that the Magistrate had designedly deprived the complainants of legal assistance, and provided them with a false interpreter, then such wicked conduct would not only be itself indefensible but would colour all the rest. Upon the whole it cannot be denied that if any substantial part of this defamation was true, it meant ruin to the career of Mr. Andrew and any others engaged in conspiring with him as alleged.

The points put forward in the appellant's favour as establishing that although the charges were false yet he was excused by Statute because he believed them *bona fide* and had given due care and attention to their truth were substantially three. In the first place it was urged that he relied upon a letter published with the signature of "Vigilance," and addressed to the *Rangoon Times*. It is dated the 31st August, 1911, and at that time the appellant was connected with that paper. It contains a long narrative incriminat-

ing McCormick and also Mr. Andrew and others.

The second element proponed in support of Mr. Arnold's good faith is of a different and an important character. It is this: In the district of Tenasserim referred to, the position of Sub-Divisional Magistrate was occupied by Mr. Buchanan. It is alleged that Mr. Buchanan had been on unfriendly terms with McCormick, but their Lordships do not think that there is anything substantial in this allegation, and they further think it right to put on record their opinion, which is in entire concurrence with that of the Chief Judge, that Mr. Buchanan in his investigations and conduct was actuated by entire good faith. Although his conclusions and suspicions may have been erroneous, their Lordships see no reason to think that from beginning to end he did not act in accordance with the best traditions of the service. He had been absent on leave from the middle of April to about the middle of May, 1911, and on his return he heard rumours of misconduct by McCormick. Towards the end of June Mahomed Din who had had legal differences with McCormick, made allegations which amounted to a charge that the crimes of abduction and of rape had been committed. Mr. Buchanan himself made enquiries and came to the conclusion that McCormick should be put upon his trial. It is a point in the accused's favour that the Sub-Divisional Magistrate thought that there was case for committal.

The third point in these protracted proceedings, which is more important than either of the foregoing in support of the contention that the writer of the libels believed them to be true, is the admitted conduct of McCormick himself. Their Lordships do not attach much weight to the question of abduction, because it appears to be the case that the child had formerly lived in McCormick's house for a short period, and the evidence is somewhat confused as to the conduct of the mother of the child in regard to her absence from the house. But the allegation made by McCormick was that he had been informed that this child was suffering from gonorrhoea, that he had taken her to his house, and himself (there being a hospital eight miles away) had personally examined her, and had then

passed her on for treatment by the mistress of one of his male servants. But their Lordships find themselves in entire agreement with the learned Judge when he says :

"It is not surprising that there should be indignation and hot feeling on the part of the sympathisers with the mother of the child Aina and good reason for feeling of indignation at some of the conduct—the admitted conduct—of McCormick,However strong his inclination for amateur doctoring may have been, there could have been no justification for that. It was a thing that no man with a proper sense of decency should have done."

Although accordingly it is no part of the submission of the counsel for the appellant at their Lordships Bar that McCormick was guilty, their Lordships think it is an element relevant to the consideration of whether Mr. Arnold was acting in good faith in these libels to shew that he believed that McCormick's own admissions would have justified his committal for trial.

The last matter which their Lordships reckon to be a perfectly relevant one in the category of elements in the case which bore upon the point of the accused's good faith was this. Importance is attached to a pronouncement by the Magistrate. After investigating the facts, and declining to commit, he went on to say that in his opinion McCormick's conduct was pure and philanthropic. Their Lordships cannot agree with such an opinion and their views coincide with those of the Chief Judge upon that subject.

They are of opinion that there were thus several elements in the case which were all with perfect propriety submitted to the jury in support of the defence. Their Lordships, however, do not attach so much importance to the other allegations. That as to bail having been granted to the accused rests on a slender foundation. It is held by the Judges on the spot, and it is proved to be also the opinion of the civil authorities, that the discretion of granting bail applied to this case. It was evidently a case, unless forbidden by Statute, for discretion being exercised, and it would rather appear to their Lordships looking to the great distance to be traversed before the authority claimed by the appellant as requisite for granting bail could be obtained, that much practical hardship would ensue to prisoners unless such a discretion existed. They are not prepared to say

that the humane view which was taken of an accused's rights was mistaken. It is unnecessary in this case to decide or dwell upon the point, because their Lordships' opinion is very clear to the effect that this difficult and delicate point of law could never have been viewed as a substantial element weighing with any reasonable writer in justification of his belief in the truth of the libel. The same observation applies to the other elements in the case which need not be entered upon but all of which have been fully considered. Their Lordships are of opinion that a fair and statable case in support of the Statutory defence and of the belief in the wickedness of Mr. Andrew was put forward on the points which have been already enumerated, but that no others were of any real weight. In putting forward, however, the points mentioned, their Lordships think that a case was made which demanded an answer.

Such an answer was given, and it also was both fair and statable.

In the first place, a serious and weighty reply was made on the subject of the letter signed "Vigilance". It was not confined to the remark that the letter was no valid excuse for a belief in gross slander. The points proved were these: When that letter was received by the *Rangoon Times* a most proper course was taken and that with the appellant's knowledge. It was forwarded by Mr. Stokes, the assistant editor, to the Chief Secretary to the Government of Burma, so that there might be official confirmation of its allegations prior to its being published. These allegations were examined into, and on the 31st October, the Chief Secretary wrote stating that the Lieutenant-Governor had caused inquiry to be made and had found that the allegations against the officers were without foundation. By this time the appellant had ceased to be editor of the *Rangoon Times*, but on the 22nd November, 1911, Mr. Stokes forwarded a reply to the Chief Secretary stating that the incident, so far as the *Rangoon Times* was concerned was closed.

This was not so, however, with regard to the appellant, for in the following spring, namely, on the 7th March, 1912, an article appeared in the *Burma Critic*, of which he was then editor, entitled "Alleged Grave Scandals in Tenasserim."

On inquiry being officially made of the appellant, asking for particulars, the answer given was that the case referred to was that inquired into and disposed of in the previous autumn. The appellant's attention was at the same time called to the fact that Mr. Stokes had accepted the reply of the Lieutenant-Governor. All this took place before the libels in question were published.

Their Lordships cannot see their way to hold this part of the appellant's case to be satisfactory.

An investigation in the department of a Lieutenant-Governor of great experience having resulted in exonerating Mr. Andrew from blame, the appellant assumed the grave responsibility for re-opening the matter. He gave the authorities no inkling of any fresh information which had come to his hand, and in answer to their enquiry he simply stated that it was the old incident which he was reviving. Up to the present the appellant has not given at their Lordships' Bar or in any Court any statement of any fresh facts which he had discovered. This circumstance was, in their Lordship's opinion, well worthy of consideration by the jury.

In the second place, both Judge and Jury had seriously to consider the attitude of Mr. Arnold himself. He neither defended the articles as true nor did he give any assistance on the subject of what were the actual things upon which he founded his own beliefs not finally upon what the steps were, if any, which he took to investigate their truth before giving them to the public.

Thus, although the true issue in the case was as to his own *bona fides* and the care and attention which would verify that Mr. Arnold's action when charged gave no help to the Court and must to some extent have embarrassed even his own defence. Having admitted that he assumed responsibility for the articles, he was asked by the Magistrate as follows:

"Q. Do you wish to make any explanation of your position in the case as to your *bona fides*, etc.? (I pointed out to the accused that, under Section 105, the burden of proof lies upon him.)"

"A. No I have nothing to say. Everyone, from the Lieutenant-Governor downward, knows my character, and I leave it at that."

But of course it was quite impossible to leave it at that, because the libels were

there, in all their number and seriousness; the charge was made under the Statute, and the law had prescribed that the author of such libels could only be excused by showing good faith after due care and attention. It is not in accordance with the due or proper administration of justice for an accused to brush all the statutory regulations affecting his position aside in this manner. The attitude and absence of the accused may well have been considered by the jury rather destructive than helpful to the defence set up.

In the third place, this has to be borne in mind. Every officer, judicial or administrative, who investigated this case, except Mr. Buchanan, had agreed with the conclusion at which Mr. Andrew had arrived, namely, that the charge should be dismissed. This circumstance was one peculiarly suited for the appraisal of a local jury.

The next circumstance in the case is one to which their Lordships do not conceal that they attach serious importance. They were moved by the allegation that the prosecutors and those in that interest were alleged to have been led on to the trial by Mr. Andrew, and that Mr. Andrew had wickedly conspired suddenly to leave them in the lurch without an advocate, and to furnish them with a false interpreter. This allegation was, as it turned out, not only untrue, but was, as was made abundantly clear at the trial, particularly cruel. Letters were produced showing that instead of Mr. Andrew having taken up such an attitude, his desire, and indeed his endeavour and entreaty, throughout were that in the enquiry before him an advocate should not only be employed for the prosecution, but should, in fact, be paid by the Government. Letter after letter was written to this effect to engage a pleader. On the 3rd August, 1911, Mr. Andrew, had intimated to Mr. Buchanan that he would engage an advocate to prosecute, and that his presence and the presence of Mr. Sherard, the investigating officer, would also be required. On the 4th he specially wrote to Mr. Buchanan, "Can you bring up interpreter trusted by all parties? Ask complainants to choose between," two advocates named, "to conduct their case." On the 7th Mr. Buchanan having been unable to

get such an interpreter, but having stated that the complainant wished to consult a certain vakil in Rangoon before choosing a lawyer to conduct the case, Mr. Andrew wrote to Mr. Buchanan, "Kindly do so, and name advocate early. As regards interpreter, your Court interpreter must come along to assist at any rate." On the 10th, sanction was asked to engage Muhamed Ayooob "on the terms he asks." It most clearly appears from the letters that the arrangement as to legal assistance broke down, because upon the 12th August, the Commissioner at Mergui declined to sanction the proposal to retain an advocate, he having demanded of Mr. Andrew to state whether he thought the charges could be substantiated, and Mr. Andrew having stated in answer to this difficult question that he thought the abduction charge alone could be made out. In short the refusal to provide an advocate was made neither by Mr. Andrew nor by connivance or consent of Mr. Andrew but in spite of him. With regard to the interpreter it should also be added that Mr. Andrew's anxiety upon that subject was manifest, and it was entirely in the right direction. Mr. Buchanan objected to one Chean Gee and he recommended Musaji. As mentioned Mr. Andrew wanted an "interpreter trusted by all parties" and Musaji, Mr. Buchanan's nominee, was employed. Mr. Buchanan was present at Mergui during the investigation and he made no objection to this. There was, of course, no proof that a single word was interpreted falsely. In their Lordships' opinion these two parts of the libel were very gross, and they can see no justification for the proposition that the appellant had any reasonable ground for believing them to be true.

It does not appear that in any view of the case there could have been a defence under the Statute in regard to these substantial portions of the libellous matter, and the case of *Queen v. Newman* (1), was founded upon to this effect. But their Lordships are very anxious, however, not to have the case disposed of on what may be considered a narrow ground. They take these points as included in the sum of the matter to be considered before the jury as relevant to

the general case of Mr. Arnold's justification on the ground of having, after due care and attention, and so in good faith, believed that these things were true.

One final matter has, however, to be kept in view. Some of the letters last cited were undoubtedly not before Mr. Arnold when he wrote the libels. But they were before him in the course of his trial. In their Lordships' opinion, when it was discovered that, the truth with regard to Mr. Andrew had not been that in these particulars he wickedly conspired to defeat justice, but that he was on the contrary, anxiously endeavouring to secure that justice should be furthered and guarded, then the duty of the accused, Mr. Arnold, was plain. Their Lordships make every allowance for the heat of advocacy which as noted by the Chief Judge, seems to have been in this case great. But when a gross mistake of that kind on a matter of fact—the truth of which when exposed would have ruined any administrative or judicial officer's career—was discovered, the libel should not have been adhered to for a moment. The mistake should have been acknowledged and an apology tendered. This was not done, but upon the contrary the case was conducted to its close upon the footing that an unstated defence was the real and good defence, namely, that the libels and all the libels were true. Nobody is to be blamed in these circumstances for thinking that the plea of good faith on the part of Mr. Arnold had sustained a serious shock.

The speeches of the learned counsel for the accused have not been printed, but their Lordships had the advantage of hearing Mr. Wilson who has been in communication with those engaged in the case and who informed their Lordships that the views presented by the senior and junior counsel for the appellant somewhat diverged. It is however, unnecessary to labour this matter, because, no doubt was thrown upon the narrative of the proceedings given by Sir Charles Fox in his charge. There is enough disclosed in the case to show that no light task was thrown upon the Judge in disentangling relevant from irrelevant topics and in presenting the true issue to the minds of the jury. The real objection taken at their Lordships' Bar to this charge was that the jury were

(1) [1853] 1 E. and B. 558=93 R. R. 275=7 Jur. 617=22 L.J.Q.B. 156.

misdirected in this sense, that the narrative of the learned Judge must have left the impression upon the mind that Mr. Andrew had not acted wickedly as the libel alleged. But it was, looking to the advocacy, necessary for the learned Judge to state his own view, and their Lordships do not see anything in the charge to give countenance to the idea that he withdrew this question from the jury or from their province. With a large portion even of the narrative their Lordships see no occasion to quarrel. Some portions of it here and there might be the subject of difference of opinion.

A charge to a jury must be read as a whole. If there are salient propositions of law in it, these will of course, be the subject of separate analysis. But in a protracted narrative of fact, the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the jury's province. Their Lordships do not say that upon any particular in this case they would differ from the views laid down by Sir Charles Fox, but these observations are made in order to discountenance the idea that in the region of fact, unless something gross amounting to a complete misdescription of the whole bearing of the evidence has occurred, this Board will interfere. The separate and peculiar position of this Committee under the Constitution will be afterwards dealt with.

Their Lordships regret to find that there appeared on the one side in this case the time-worn fallacy that some kind of privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever length the subject in general may go, so also may the journalist, but apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may and in the case of a conscientious journalist do, make him more

careful; but the range of his assertions, his criticisms, or his comments is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.

Upon the other side it would appear from certain observations of the learned Judge that this false and dangerous doctrine may have been hinted at, that some privilege or protection attaches to the public acts of a Judge which exempts him, in regard to these, from free and adverse comment. He is not above criticism, his conduct and utterances may demand it. Freedom would be seriously impaired if the judicial tribunals were outside of the range of such comment. The present case affords a good illustration of what is meant. When the examination before Mr. Andrew concluded with his declaration that in his judgment the action of McCormick was pure and philanthropic, the whole trial would seem to have been laid open to searching and severe observations and no blame could be attached to these. But when the criticism was converted into an attack upon the Magistrate as a conspirator against justice, a traitor to his oath, a trickster, a man who had manœuvred his procedure so as to defeat truth and protect an associate, then, of course, it is for the person who has uttered these things to justify them, or, under the Indian Penal Code, to establish affirmatively that he believed them to be true, and that on reasonable grounds. On both of these matters last mentioned the learned Judge seems to have properly directed the jury.

This also has to be said. A large part of the criticism directed against the charge of the learned Judge in this case was to the effect that the narrative of the proceedings led up to the conclusion inevitably that Mr. Andrew was innocent of the wicked dereliction of duty which was alleged. If it was so, the result upon the case is somewhat remarkable. For then the charge had in fact impressed the jury's minds with the innocence of Mr. Andrew, and it is that very innocence which is in the foreground of the admissions made in this case. The foregoing narrative in this view might have been spared, because it is now seen that nearly all, if not all, of the items in the narrative which are said to constitute misdirection are parts of a narrative which leads to a conclusion that

that is in accordance with fact which has all along been admitted to be true.

It is here that the peculiarity of the procedure becomes evident, for the narrative thus criticised was undoubtedly, as it appears to their Lordships the narrative given by the learned Judge to the jury in order to counteract an improper use which was being made of the procedure. While the truth of the libels was not asserted formally, and while the admission of their falsehood was formerly granted, an endeavour was repeatedly made to withdraw all this and to persuade the jury to take all that was asserted as true. Such things may occur; but it is the duty of Judges to put what check they can upon them, and in the present case their Lordships see no occasion to think that the learned Judge failed to exercise that duty with propriety.

From what has been said it will, their Lordships think, clearly appear that there was material before jury on both sides of this case, and that the determination was on a subject peculiarly within the jury's province. In their Lordships opinion the case was not improperly withdrawn from the jury's domain on fact, and they were not misdirected in law. But even if it were conceded that upon a meticulous examination of the Judge's charge or conduct of the case certain flaws could be discovered it is the duty of their Lordships to consider the special position and function of the Board, in criminal cases as the advisers of the King. The frequency of applications made to the Board for leave to appeal against the judgments of criminal tribunals in various parts of the Empire, as well as the thoroughness with which the powers and practice of the Judicial Committee were discussed in this case, incline their Lordships to make a deliberate survey of this important topic.

The question is not truly one of jurisdiction. The power of His Majesty under his Royal authority to review proceedings of a criminal nature, unless where such power and authority have been parted with by Statute, is undoubted. Upon the other hand, there are reasons both constitutional and administrative, which make it manifest that this power should not be lightly exercised. The over-ruling consideration upon the topic has reference to justice itself. If through-

out the Empire it were supposed that the course and execution of justice could suffer serious impediment, which in many cases might amount to practical obstruction, by an appeal to the Royal Prerogative of review on judicial grounds, then it becomes plain that a severe blow would have been dealt to the ordered administration of law within the King's dominions.

These views are not new. They were expressed more than 50 years ago by Dr. Lushington in his judgment in *Queen v. Joykissen Mukerjee* (2) and Lord Kingsdown, in the case of *Falkland Islands Co. v. Queen* (3) stated the matter compendiously in these words:—

"It may be assumed that the Queen has authority by virtue of her prerogative to review the decisions of all colonial Courts, whether the proceedings be of a civil or criminal character, unless Her Majesty has parted with such authority. But the convenience of entertaining such appeals in cases of a strictly criminal nature is so great, the obstruction which it would offer to the administration of justice in the colonies is so obvious, that it is very rarely that applications to this Board similar to the present have been attended with success."

Their Lordships desire to state that in their opinion the principle and practice thus laid down by Lord Kingsdown still remain as those which are followed by the Judicial Committee.

There have been various important cases in recent times to which, naturally, reference has been made. The first is the case of *Re Dillet* (4). It should be observed that while *Dillet's Case* (4) was in form an application within the ambit of criminal law, the matter of substance which was truly brought before the Judicial Committee was a civil matter. The appeal was by a barrister and solicitor against a verdict convicting him of perjury, but there had been a consequential order of the Court directing him to be struck off the roll of practitioners, and special leave was granted to appeal in reference to the consequential order. Lord Blackburn referred to *Lord Kingsdown's* judgment in the *Falkland Islands Case* (3) as authoritative and binding. After citing

(2) [1862] 1 Moo. P. C. (N. S.) 272=138 R. R. 522.

(3) [1863] 1 Moo. P. C. (N. S.) 299=10 Jur. (N. S.) 807=9 L. T. (N. S.) 103=138 R. R. 535=9 Cox. C. C. 351=12 W. R. 220

(4) [1887] 12 A. C. 459=36 W. R. 81=56 L. T. 615=16 Cox. C. C. 241.

that learned Judge, Lord Blackburn added :

"In this statement of the general practice their Lordships agree. They are not prepared to advise Her Majesty to make this conviction for perjury an exception if it were not made the sole foundation for the subsequent order of the 27th March, 1885, and liberty accordingly was granted to appeal against the order of the 27th March, 1885, striking him off the roll, and also to the extent above stated, and no further, against conviction for perjury."

While accordingly the familiar sentences again about to be quoted from Lord Watson are frequently cited with reference to criminal review in general by this Board, this outstanding circumstance just alluded to ought not to be forgotten. It appears to dispose of the argument that the practice of the Board was in purely criminal matters in any respect either advanced or distorted from the position that it occupied under the judgments of Dr. Lushington and Lord Kingsdown pronounced about a quarter of a century before. Lord Watson in *Dillet's Case* (4) observed that

"the rule has been repeatedly laid down and has been invariably followed that Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise substantial and grave injustice has been done."

The present case brings prominently before the Board the question of what is the sense in which those words are to be interpreted. If they are to be interpreted in the sense that wherever there has been a misdirection in any criminal case, leaving it uncertain whether that misdirection did or did not affect the jury's mind, then in such cases a miscarriage of justice could be affirmed or assumed, then the result would be to convert the Judicial Committee into a Court of Criminal Review for the Indian and Colonial Empire. Their Lordships are clearly of opinion that no such proposition is sound. This Committee is not a Court of Criminal Appeal. It may in general be stated that its practice is to the following effect: It is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law unless there has been such an interference with the elementary rights of an accused as has placed him outside of the pale of regular law, or, within that pale, there has been a violation of the natural principles

of justice so demonstratively manifest as to convince their Lordships, *first*, that the result arrived at was opposite to the result which their Lordships would themselves have reached, and, *secondly*, that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided. The limited nature of the appeal in *Dillet's Case* (4) has been referred to, and their Lordships do not think that its authority goes beyond those propositions which have now been enunciated.

The argument for the appellant was to an entirely contrary effect. In the forefront of it the case of *Makin v. Attorney General for New South Wales* (5) was cited. Makin's Case in truth did not raise the question at issue in the present case. It depended upon the construction of Section 423 of the Criminal Law amendment Act, of 1883 (a New South Wales Statute). That section set up the Judges of the Supreme Court as a tribunal to determine questions submitted to them in a case stated by the Judge at the trial, and there was a proviso that there should be no quashing "unless for some substantial wrong or other miscarriage of justice." It was stated by this Board that under that section the Judges have not been substituted for the jury. As they said :

"In their Lordships' opinion substantial wrong will be done to the accused if he were deprived of the verdict of the jury on the facts proved by legal evidence and there were substituted for it a verdict of the Court founded merely upon the perusal of the evidence"

The second case founded on is that of *Vaithinatha Pillai v. King-Emperor* (6) in which this Board sustained an appeal. The circumstances of the case, however, were of the most extraordinary character, and were such as appeared to the Board imperatively to demand that it should interpose, because the very foundations of justice seemed to have been attacked in the proceedings. A whole body of inadmissible evidence had been received in the case. The one witness whose evidence was relevant and who remained in the case was supporting another witness who was a confessed perjurer. The re-

(5) [1894] A. C. 57=6 R. 373=69 L. T. 778=58 J. P. 148=17 Cox. C. C. 704=63 L. J. P. C. 41.

(6) [1913] 36 Mad. 501=21 I. C., 369=401 A., 193 (P. C.).

maining witness himself had given under oath conflicting and contradictory accounts in previous judicial proceedings before the Magistrate and certain officials. "If true," observed Lord Atkinson

"They show that these officials, or at least the Sub-Inspector, induced the witness to forswear himself and found in him a plain instrument ready to give false evidence upon oath to secure the conviction of his own father; and if false they show that the witness was ready to commit deliberate perjury whenever he was confronted with the inconsistencies in his former statements. There is no alternative."

The simple case accordingly confronting the Board was a case of a subject sentenced to death upon no evidence at all. In these circumstances, although the principle of *Dillet's Case* (4) was again re-affirmed, their Lordships did not see their way to refrain from interfering.

The third case referred to is that of *L. E. Lanier v. King* (7), and, fortunately it is seldom that such a travesty of justice can be witnessed. One of the notable features of the case had reference to the Judge himself. He, as narrated in the report, was a member of the family council which instigated the proceedings and himself was a party to appointing two barristers to conduct the prosecution and arranged about their fee. The facts need not be referred to. The indictment was altered by drastic amendments; the trial was hurried on; but the narrative need go no further, for, as the report states,

"In short, counsel for the Crown at the Bar of this Board very properly admitted that he could not contend that any jury upon the evidence submitted would have convicted the appellant of crime"

The Board were of opinion that the sentence pronounced against the appellant

"Formed such an invasion of liberty and such a denial of his just rights as a citizen that their Lordships feel called upon to interfere."

But the Board took care to repeat that it did not lightly interfere, and the language of Lord Watson in *Dillet's Case* (4) was again cited. It was pointed out that the interference was not on any matters of form, but because of matter lying at the very foundation of justice (the Judge had been a judge in his own cause), justice had "gravely and in-

juriously miscarried." *Lanier's Case* (7) stands a fair type of almost the only case in which this Board would advise the interposition of His Majesty the King with the course of criminal justice in the colonies or dependencies. That extreme case is, this, that it must be established demonstrably that justice itself in its very foundations has been subverted, and that it is therefore a matter of general Imperial concern that by way of an appeal to the King it be then restored to its rightful position in that part of the Empire.

Their Lordships were referred to the dicta of Judges and the rules set up with regard to the procedure of the Court of Criminal Appeal in England; but they are not the rules adopted by this Board, which, as already stated, is not a Court of Criminal Appeal. And the authority of these decisions, which apply to a different system, a different procedure, and a different structure of principle, must stand out of the reckoning of any body of authority on the matter of the procedure of this Board in advising His Majesty. This view is in entire accord with the recent proceedings of this Board on applications for leave to appeal. One instance of this is that of *Clifford v. King-Emperor* (8) on the 17th November last, and their Lordships refer to the judgment of the Lord Chancellor in this and the other refusals referred to.

The application to the present case is simple. Even had this Committee been a Court of Criminal Appeal it is hardly doubtful that the appeal would fail. *A fortiori* their Lordships are left in no doubt as to their own duty in conformity with the practice of the Board. They will humbly advise His Majesty that the appeal be dismissed. There will be no order as to costs.

T. S. N.

Appeal dismissed.

Solicitors for Appellant—Bramall & White.

Solicitors for Respondent—Solicitor, India Office.

(7) [1914] A. C. 221=83 L. J. P. C. 116=24 Cox C. C. 53=30 T. L. R. 53=110 L. T. 326=18 C. W. N. 98=23 I. C. 657=26 M. L. J. 1 (P. C.)

(8) [1913] 41 Cal. 568=22 I. C. 496=40 I. A. 241.

A. I. R. 1914 Privy Council.

(FROM CALCUTTA)

2nd February, 1914.LORDS SHAW AND MOULTON AND
MR. AMEER ALI.*Bijoy Gopal Mukerji and others*—Appellants

v.

Girindra Nath Mukerji and others—Respondents.(a) *Hindu Law—Widow—Adverse possession against widow.*

Prior to 1858, adverse possession against a widow ranked as adverse possession against the reversioners.

(b) *Hindu Law—Alienation by widow—Necessity was held proved on the facts of the case.*A Hindu widow granted an *ijara* for a term of 60 years, as a part of a general family settlement. The reversioners consented to it. They took benefit under the family settlement. At the moment of her death, the term of the *ijara* had not expired and the actual reversioners sued for a declaration that the *ijara* was invalid after the widow's lifetime.*Held* that on the facts of the case, the arrangement of which the *ijara* formed part was in truth dictated by the necessities of the case, and that the choice of the term of 60 years as the term of *ijara* was made for the benefit of the estate and did not injure any one.*Held*, further that the plaintiff's conduct showed that he himself believed the transaction to be valid and this fact might be relied on by the defendants.*DeGruyther* and *E. U. Eddis*—for Appellants.*Robert Finlay* and *G. R. Lowndes*—for Respondents.**Lord Moulton:**—The substantial question in this appeal is the validity of an *ijara* executed on the 7th September, 1863, for a term of 60 years, by a Hindu widow named Sayamoni Debi, under circumstances which it will be necessary to refer to in some detail.

Sayamoni Debi was the widow of Chandra Bhusan Mukerji. Her husband died in 1832 without leaving any issue, making her his sole heiress. The property consisted chiefly of landed property of considerable value.

Sayamoni was a *pardanashin* lady and probably not very capable of managing a large estate. She appears to have been dispossessed of the property by one of her husband's relatives, Baman Das Mukerji, and was compelled, in 1844, to bring a suit against him and his two

brothers Gouri Prasad and Annada Prasad to recover it. This litigation lasted till 1858, when on appeal to His Majesty in Council, the rights of Sayamoni to the estate of her husband were finally established. But although this was the case, it is evident that she did not thereupon obtain possession of the property. Further difficulties were raised and much of the property was threatened with the growth of adverse rights in the actual possessors of the land, who refused to pay rent under the pretext that the title had not been settled, and seeing that, prior to 1858, adverse possession against a widow ranked as adverse possession against the reversioners, there can be no doubt that the whole estate was in very serious peril.

While this state of things was still continuing the *ijara* now in question was executed by the widow. Although at this distance of time it is impossible to ascertain with accuracy all that then happened, it is evident that this *ijara* was part of a general family settlement whereby the widow divided up the family property amongst the various reversioners, reserving to herself only a comparatively small annual income which may fairly be looked on as representing maintenance. The *ijara* itself was granted to Annada Prasad and Saroda Prasad who was the son of Gouri Prasad who had died in the interval. The third brother, Baman Das Mukerji, did not directly take any interest under the *ijara*, but in October 1863 a *dar-ijara* was granted to his son of a portion of the property, and we find also that a large sum due from him on account of *mesne* profits was remitted by Sayamoni, so that it is clear that all branches of the family shared in the settlement.If the term of the *ijara* had been for the life of Sayamoni, no question could have arisen such as is now before their Lordships. But doubtless from the necessities of the case, in order to facilitate the practical settlement of the property so as to obtain its full value the term was made for a fixed period of 60 years. Inasmuch as the lady was 42 years of age at the date when the *ijara* was granted, it is evident that all the parties realised that the term would extend beyond her lifetime, and thus affect the rights of the reversioners whosoever they might happen to be. So far as the persons are concerned who then represented the reversion

it is clear that all this was done with their consent. They all took large interests under the arrangement, and have continued to enjoy them so long as they lived.

One of the parties who principally benefited by the ijara was Annada Prasad, who was one of the actual lessees under the ijara. He died in 1882, so that Sayamoni (who died in 1893) survived him 11 years. The appellants are four sons of Annada Prasad, and on the death of Sayamoni they became entitled directly to share in any family property of which she was the life tenant, and they have brought this action to set aside the ijara on the ground that it was an unauthorised interference by the widow with the reversionary interest which did not belong to her. The Court below, in a careful and well reasoned judgment, has decided that, on the facts of the case, the arrangement of which the ijara formed part was in truth dictated by the necessities of the case, and that the choice of the term of 60 years as the term of the ijara, was made for the benefit of the estate and did not injure anyone.

Their Lordships agree with this judgment. They are of opinion that the case depends entirely on the facts, and that it raises no new question of law as to the powers of a Hindu widow to deal with family property in case of necessity with the consent of the then present reversioners, and they are, therefore, of opinion that the appeal fails.

Counsel for the appellants laboured to show that the so-called settlement by which peace for 30 years was brought into the family and, in their Lordships' opinion, the family property was in fact saved was an outrageous and flagrantly unjust arrangement forced upon a helpless *pardanashin* widow by her influential relations in whose hands she was, and that any person either at the time or since must have known from its terms that it had been extorted by duress or engineered by fraud. Their Lordships are of opinion that counsel entirely overlooked the evidence against this contention which is derived from the conduct of his own clients. From the year 1882, when Annada Prasad died, to the year 1893 when Sayamoni died, they themselves took the benefit of this arrangement which they now stigmatise as a gross fraud. It is

suggested on their behalf that they thus made themselves participants in it solely because it was profitable so to do. Their Lordships decline to believe them to be as unscrupulous as they desire to be considered. As against them it is a fair inference from their conduct that they believed that the arrangement had been made in good faith, and under such circumstances of necessity as would give it validity according to Hindu law and as it has always been a feature of Hindu Law as administered by this Board to attach great weight to the sanction by expectant reversioners of an alienation of property by a Hindu woman as affording evidence that the alienation was under circumstances which rendered it lawful and valid. Their Lordships in this case consider that the conduct of the appellants themselves during those years affords evidence upon which the respondents are entitled to rely.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs.

T. S. N.

Appeal dismissed.

Solicitors for Appellants—Sanderson, Adkin, Lee and Eddis.

Solicitors for Respondents—T. L. Wilson and Co.

**** A. I. R. 1914 Privy Council.**

(FROM CALCUTTA).

18th May, 1914.

LORDS MOULTON AND PARKER OF
WADDINGTON, SIR JOHN EDGE AND
MR. AMEER ALI.

Ragunath Das and others—Appellants

v.

Sundar Das Khetri and another—Respds.

**** (a) Civil P.C., S. 64 (Old Code, S. 276)—Attachment does not invalidate alienation by operation of law—Property vesting in Official Assignee under Insolvent debtor's Act of 1848, after order for sale has been passed—Sale held without Official Assignee being properly brought before Court—Sale is inoperative.**

Attachment in execution of a money-decree followed by an order for sale does not confer on the judgment-creditor any charge on the land, [1869], 1 N.W.P.H.C.R. 172. Ref. An attachment

prevents and avoids any private alienation, but does not invalidate an alienation by operation of law such as is effected by a vesting order under the Insolvent Debtors Act of 1848, and an order for sale though it binds the parties does not confer title. [P. 130, C. 2.]

After such vesting order has been made the execution cannot proceed without the Official Assignee being properly brought before the Court. The Official Assignee could show why the decree should not be executed. [P. 131, C. 1.]

(b) *C. P. C. (1882), S. 248—Notice to legal representative is necessary for the Court to get jurisdiction.*

A notice under Section 248 is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor. If the Court gets this jurisdiction by service of notice, it has jurisdiction to sell the property through its decision as to who is the legal representative be wrong. There being jurisdiction to sell, and the purchasers having no notice of any irregularity the sale is valid unless set aside by appropriate proceedings. [P. 132, C. 1.]

20 C. 370 approved.

(c) *Civil P. C. (1882), S. 248—Property vesting in Official Assignee, after order for sale—Official Assignee can be properly brought before executing Court only by proceeding under S. 248.*

Where subsequent to an order for sale, the judgment-debtor's property vested in the Official Assignee,

Held, that the Official Assignee could be properly brought before the executing Court only by service of notice on him under Section 248 of the Civil Procedure Code of 1882 which applied at the time. [P. 131, C. 1.]

(d) *Civil P. C. (1882), Ss. 32 & 372—It is doubtful whether they apply after final decree—Civil P. C., (1882), Ss. 372 & 32.*

There is considerable doubt as to whether Sections 32 & 372 of the Code of 1882 are applicable after final decree. 10 All. 97 Ref. [P. 131, C. 1.]

* (e) *Civil P. C., (1882), S. 248—Notice calling upon person to show cause why he should not be substituted for the judgment-debtor is not proper notice.*

A notice calling upon a person to show cause why he should not be substituted in the suit for the judgment-debtors is not a proper notice under S. 248. A notice under that section should call upon the person to show cause why the decree should not be executed against him. [P. 131, C. 1.]

(f) *Civil P. C., (1882), S. 32—Notice to show cause why a person should not be added as a party might be proper if S. 32 applied to the case.*

A notice calling upon a person to show cause why he should not be substituted for a judgment-debtor in a suit might be upheld as a proper notice preliminary to adding the person as a party under S. 32 if that section were applicable. But in order to bind a party added under the 32nd section, he has, after being added, to be served with a summons to appear and answer. [P. 131, C. 1.]

* (g) *Evidence Act, S. 114—Fresh sale proclamation necessary under the law, not put in evidence—Property offered for sale was presumed to be the property ordered to be sold.*

A fresh sale proclamation was necessary by reason of Section 291 of the Civil Procedure Code (1882). Such proclamation was not in evidence.

Held, that the Court must presume in default of evidence to the contrary that the property offered for sale was the property ordered to be sold. [P. 131, C. 2.]

DeGruyther and Dunne—for Appellants.
Dube—for Respondents.

Lord Parker :—The action in which this appeal arises is an action for the recovery of a leasehold colliery. The plaintiffs (the present appellants) claimed title to the property under the Official Assignee in the insolvency of the lessees. The order vesting the property in the Official Assignee was made under the Insolvent Debtors (India) Act, 1848, on the 8th September, 1904. At the date of this order the colliery had been attached in execution case No. 303 of 1904, in which the lessees were the judgment-debtors and the defendants (the present respondents) were the judgment-creditors and an order had been obtained for the sale of the interest therein of the judgment-debtors. Counsel for the respondents admitted that attachment in execution of a money-decree followed by such an order for sale does not confer on the judgment-creditor any charge on the land, (See *Sarkies v. Mussumat Bandno Bace* (1)). An attachment prevents and avoids any private alienation, but does not invalidate an alienation by operation of law such as is effected by a vesting order under the Act of 1848, and an order for sale, though it binds the parties does not confer title.

It follows that under the order of the 8th September, 1904, the property vested in the Official Assignee free from any charge in favour of the judgment-creditors. The Official Assignee in due course, by order of the Court having jurisdiction in the insolvency, sold the property, and the appellants derive title through the purchaser. Their title is thus *prima facie* a good and valid title, but it is disputed by the respondents under the following circumstances.

On the 12th September, 1904, the Judge in the execution proceedings stayed the sale therein directed, until further order. This was the proper and indeed the only thing he could do, for the judgment-deb-

tors had no longer any interest which could be sold. Further, if, as was no doubt the case, the judgment-debt was included in the schedule filed by the insolvents under the Act, their Lordships are of opinion that he was bound to stay the sale under Section 49 of the Act. At any rate the execution could not proceed until the Official Assignee had been properly brought before the Court and an order binding on him had been obtained. In their Lordships' opinion, this could only be done by obtaining an order for the issue of, and by serving him with a notice under Section 248 of the Civil Procedure Code of 1882, which was the Code then in force. It was suggested in argument that he might have been made a party to the proceedings either under Section 32 or under Section 372 of the Code, but even if these sections are applicable after final decree as to which there is considerable doubt (See *Goodall v. Mussoorie Bank Ltd.* (2) no proceedings seem to have been taken thereunder. What the judgment-creditors did was this: they applied to the Judge in the execution case for an order, and on the 30th September, 1904, and again on the 3rd November, obtained an order for the issue and service on the Official Assignee of a notice calling upon him to show cause why he should not be substituted in the suit for the judgment-debtors. This was not a proper notice under the 248th section. A notice under that section should have called upon the Official Assignee to show cause why the decree should not be executed against him. Had the Official Assignee been served with such a notice it is at least probable that he would as in their Lordships' opinion be certainly could have shown good cause why the decree should not be executed, the property having under the Act and vesting order been transferred to him for the benefit of the creditors of the insolvent generally. It is possible that the notice might be upheld as a proper notice preliminary to adding the Official Assignee as a party under the 32nd section if that section were applicable but in order to bind a party added, under the 32nd section he has after being added, to be served with a summons to appear and answer and it is not suggested that any such summons was

served. Similarly it is not suggested that any order to carry on proceedings was obtained under the 372nd section.

Having obtained leave in that behalf the respondents proceeded to serve the notice in question, and their Lordships will assume that the notice was duly served on the Official Assignee. The Official Assignee took no notice of it, possibly because he had no objection to being substituted as a party, and expected to be served with notice of any further application against him. There is no evidence that he knew that an order for sale had been already made. The time fixed by the notice for cause to be shown having expired, the respondents, without further notice to the Official Assignee, applied for and obtained an order not only substituting the Official Assignee as a party in the place of the judgment-debtors but directing the sale to proceed. The sale accordingly proceeded. There had to be a fresh sale proclamation by reason of the 291st section of the Code: Such proclamation is not in evidence, but their Lordships must presume in default of evidence to the contrary that the property offered for sale was the property ordered to be sold, that is to say, the right and interest of the judgment-debtors in the colliery. At the sale the respondents (the judgment-creditors) having obtained leave to bid, became the purchasers. The sale was confirmed by the Court on the 8th April, 1905, and on the 25th April, 1905, the respondents obtained the usual certificate which refers to the right, title and interest of the judgment-debtors as the property sold. Their Lordships are of opinion that this sale was altogether irregular and inoperative. In the first place the property having passed to the Official Assignee, it was wrong to allow the sale to proceed at all. The judgment-creditors had no charge on the land and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him, and accordingly he was not bound by anything which was done. In the third place the judgment-debtors had at the time of the sale no right, title or interest which could be sold to or vested in

purchaser and consequently the respondents acquired no title to the property.

Their Lordships' attention was called in this connection to the case of *Malkarjun Bin Shidramappa v. Narhari Bin Shivappa* (3), but in their opinion there is nothing in that case which had any bearing upon the present appeal. As laid down in *Gopal Chunder Chatterjee v. Gunamoni Dasi* (4) a notice under Section 248 of the Code is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor. In the case in 27 Indian Appeals such a notice had been served, and the Court had determined, as it had power to do for the purpose of the execution proceedings, that the party served with the notice was in fact the legal representative. It had therefore jurisdiction to sell though the decision as to who was the legal representative was erroneous. There being jurisdiction to sell, and the purchasers having no notice of any irregularity, the sale held good unless or until it were set aside by appropriate proceedings for the purpose. The present case is of a wholly different character. No proper notice was served under the section and the respondents had full notice of and indeed were responsible for the irregularities of the procedure adopted.

The respondents suggested that with regard to certain machinery which was included in the sale of the colliery by the Official Assignee and which was also sought to be recovered in this action, the statute of limitations was a good defence. This point does not appear to have been taken at any time prior to the hearing before Their Lordships' Board. It was not one of the issues settled by the Court on the action, nor did the respondents mention it among their grounds of appeal from the decision of the Subordinate Judge. Their Lordships consider that it involves an inquiry as to the nature of the machinery to which it is said to be applicable and it is therefore too late to raise it.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed and the decree of the High Court of the 4th June, 1912, set aside with costs,

here and below and that the judgment of the Subordinate Judge of Burdwan of the 8th September, 1909 ought to be restored.

S. A. R.

Appeal allowed.

Solicitors for Appellants—W. W. Box & Co.

Solicitors for Respondents—Barrow, Rogers & Nevill.

*** * A. I. R. 1914 Privy Council.**
(FROM BOMBAY.)

18th November, 1914.

LORDS DUNEDIN AND SHAW, SIR JOHN
EDGE AND MR. AMEER ALI.

Karmali Abdulla Allarakia—Plaintiff.
Appellant

v.

Karimji Jiwanji and others—Defendants-Respondents.

Privy Council Appeal No. 71 of 1913.

** * Partnership—Goods purchased or money raised separately, but for joint adventure—Adventurers are liable as partners.*

Where goods are purchased or money raised for the joint adventure, and the dealing though ostensibly by an individual is truly and substantially a dealing of the joint adventure, the adventurers are liable as partners. But there is no such responsibility for goods etc. purchased on the credit of an individual adventurer previously to the contract though afterwards brought into stock as his contribution. [P. 135, C. 1.]

The first and second respondents entered into a partnership for doing business in brown sugar. It was agreed that purchases were to be made by both, but as soon as either bought, he had to give the other a delivery order for half the quantity, on the dock warehouse. When a sufficient quantity to load a ship had been purchased, a ship was to be chartered and loaded with the sugar and despatched to Hongkong for sale. Invoices of the sugar made out separately as half and half were to be sent respectively to each of their firms at Bombay. They were to draw bills on their respective Bombay firms for the value of the sugar purchased by each and if these bills were not discounted by the bank at Mauritius the place of purchase, the appellant was to interpose his credit. This agreement was in practice literally followed except for the fact that the bills were directly drawn on the appellant without first being drawn on the Bombay houses. When these bills became due the first respondent retired the bills of which he was the drawer, but the second respondent was not able to do so, as he had become insolvent by them. The appellant sued on those bills of the second respondent, and the first respondent contended that he was not responsible for the bills to which he was no party.

Held, (i) It was erroneous to treat the question as purely a question of liability on the bills.

[P. 134, C. 2.]

In re., Adanson Fibre Co. (1874) 9 Ch. 635

(3) [1900] 25 B. 337 = L. R. 27 I. A. 216.

(4) [1892] 20 C. 370.

Distinguished. It is clear from the terms of the agreement that either of the two partners by the mere fact of purchase could subject any sugar independently of the action of the other to becoming partnership sugar. A purchase of the sugar therefore becomes a purchase for the partnership and any one who sold the sugar or advanced money by which sugar was bought was crediting the partnership with goods or money. [P. 135, C. 2]

(ii) And even though the bills were drawn by the second respondent, the first was also responsible. If money is raised for the joint adventure and the dealing though ostensibly by an individual is truly and substantially a dealing of the joint adventure, the adventurers are liable as partners. *Gouthwaite v. Duckworth* (1810) 12 East. 421, referred and applied. [P. 135, C. 1.]

DeGruyther and *Henry O'Hagan*—for Appellant.

Clauson and *G. R. Lowndes*—for Respondent No. 1.

Lord Dunedin :—This action arises out of transactions connected with a venture in brown sugar entered into by the first and second respondents. The second respondent is now bankrupt and the third respondent is his official assignee: and neither of them defended the action or took part in the proceedings under appeal.

The first respondent, *Karimji*, and second respondent, *Rashid*, were both merchants carrying on business in Mauritius and had for some time been rivals in the sugar trade.

Rashid had all along also had a Bombay house, and *Karim* was in the act of setting one up, but it was not at the date to be presently mentioned yet open.

The appellant, *Karmali*, is a merchant carrying on business in Bombay and Hongkong.

Karim and *Rashid* resolved to have a joint speculation in brown sugar to be shipped from Mauritius to Hongkong. The terms of the arrangement they made between themselves were on 25th July, 1906, embodied in a stamped agreement. The document is too long to quote, but may be summarised thus—It begins with a preamble that the parties "for the purpose of doing business in partnership in brown sugar from Mauritius to Hongkong agree to act as follows." Then follow the terms. Purchases were to be made "jointly" at Mauritius. These purchases were to be made by both firms after consultation with each other, and after taking advice from the Bombay houses. No limit as to purchase is im-

posed on either firm; but as soon as either firm buys, that firm is to give a delivery order on the Dock warehouse for half the quantity of the parcel to the other firm. When sufficient sugar to load a ship has been purchased, then a ship is after consultation to be chartered, and loaded with the purchased sugar and despatched to Hongkong. Invoices of the sugar, made out separately as half and half, were to be sent respectively to each of the Bombay firms. At the same time *Rashid* was to draw bills to the value of the sugar on his Bombay house, and *Karim* on his Bombay house when it came to be opened. But until that time came he was to draw bills on *Karmali*. If the banks at Mauritius refused to discount bills on the *Rashid* or *Karim* house the Bombay firms were to be informed by wire, in which case it was said that *Karmali* would come to the rescue by interposing credit according to arrangement made with him. On the ship arriving at Hongkong the arrangements as to sale of the sugar were to be carried through by the Bombay houses. Account of sales were to come from Hongkong made up separately half and half to each. Then the invoices were to be added together and the surplus or deficit on the entire transaction was to be divided equally. Chartering was to be done in either one or both names; but all commissions were to be equally divided. In the event of the Hongkong market being bad and there being an opportunity of a profit by reselling at Mauritius, this was to be done after permission got from Bombay; and such profit on all sales was to be equally divided. The agreement was to remain good for a year from date of signing. There is then an addendum to the agreement written and signed by the plaintiff, in which he binds himself to come to the assistance of the partners if the Mauritius banks refuse to discount the bills drawn by the Mauritius firms of the two defendants on their own Bombay firms respectively.

Following on this agreement a venture was commenced, and the terms of the agreement were literally carried out, except in one particular. That is to say, sugar was bought, about 36,000 bags by *Karim*, and about 4,000 by *Rashid*. Delivery orders were then given by each to each for half of the sugar purchased

by him, and the sugar so divided on shipment was consigned to the Hongkong firm of the plaintiff. The one particular in which the agreement was not literally complied with was that the bills were not drawn by Rashid and Karim at Mauritius on Rashid and Karim in the first instance and then, on refusal of the banks to discount, recourse had to the assistance of the plaintiff; but they were at once drawn on and accepted by the plaintiff's firm at Bombay. The bills were drawn by Rashid and Karim respectively for sums approximately representing the value of the sugar shipped upon the separate invoices of each, i.e., about half and half—an exact half being unattainable on account of the packages in which the sugar was put up.

The sugar arrived at Hongkong, and was sold by the plaintiff to whom it was consigned. The venture, however, turned out a failure instead of a success; the prices realised not being sufficient to give a profit after payment of the price of the sugar, the freight, and other expenses.

The plaintiff accordingly raised this action, which is truly an action of accounting against both Rashid and Karim. Now, when the bills drawn by the two defendants had become due, and were payable to the banks who held them, Karim had retired the bills of which he was the drawer, but Rashid, who had by this time become insolvent, had not retired the bills of which he was the drawer, with the result that the plaintiff, whose name was on these bills as acceptor, had to retire them. This necessarily brought out a considerable balance on the whole transaction as due to the plaintiff. The bankrupt respondent Rashid and his Official Assignee did not oppose judgment being entered against them; but the solvent partner Karim opposed judgment upon the ground that he had paid all sums due on bills signed by himself, and that he was not liable in respect of any monies raised on bills to which he was no party.

The case depended before Russel, J. in the High Court at Bombay, who after trial found in favour of the plaintiff. The material ground of his judgment may be effectively summarised by quoting two of his findings on the issues which he incorporated with his judgment which were as follows:—

"I find (1) There was a partnership between first and second defendants' firms.....(4) The plaintiff paid and advanced moneys on the hundies (bills) for and on account and for the credit of the said partnership."

The Court of Appeal reversed that judgment. The gist of their judgment may be taken from the concluding paragraph thereof, which is as follows:—

"Treating the question as purely a question of liability between the parties to the bills of exchange it is manifest that the plaintiff cannot succeed in charging the first defendant with liability on bills of the second defendant, and having regard to what appears to us to be the correct construction of the agreement between the parties, we cannot hold that there is any collateral agreement by which one shipper agreed to be liable for the default of the other in not taking up the bills of exchange drawn by him on the plaintiff".

Their Lordships are of opinion that it is erroneous to treat the question as purely a question of liability on the bills. In other words, they think the issue proposed by the learned Trial Judge to himself was right. The case of the *In re Adanson Fibre Co.* (1) seems to have been much pressed on the Court by the learned pleader. But the very first sentence of the judgment of James, L. J. shows that in that case the only question was whether in a winding up proof could be made on the bills alone; and that all questions of ultimate liability were left undecided.

No one doubts that there was here a partnership. It is stated to be a partnership in the agreement, and it amply falls within the definition of a partnership given by the Indian Contract Act, which rules parties in this case; it is however a partnership of a limited character, and consequently liability to be enforced against one partner, when there is no document of debt which on its face binds him, can only be justified if it was shown that what he did was within the operations natural to the partnership and for the partnership.

Their Lordships think that the law on these matters is accurately stated in the well-known judgment of Lord Ellenborough in *Gouthwaite v. Duckworth* (2). In saying "the law", it would perhaps be more accurate to say, a statement of the criterion which is to be applied to the particular facts of each case in order to see whether the transaction is or is not

(1) [1874] 9 Ch. 635=31 L.T. 9=22 W.R. 889
=43 L.J. Ch. 732.

(2) [1810] 12 East. 421.

a partnership transaction. In that case it was sought to make Duckworth liable for goods purchased by Brown and Powel, and Lord Ellenborough says this:

"There seems also to have been some contrivance in this case to keep out of general view the interest which Duckworth had in the goods; the other two defendants were sent into the market to purchase the goods in which he was to have a moiety; and though they were not authorised, he says, to purchase on the joint account of the three, yet if all agree to share in goods to be purchased, and in consequence of that agreement one of them go into the market and make the purchase, it is the same for this purpose as if all the names had been announced to the seller, and therefore all are liable for the value of them."

He distinguishes the case of *Saville v. Robertson* (3) thus:—

"The case of *Saville v. Robertson* (3) does not indeed approach very near to this; but the distinction between the cases is, that there each party bought his separate parcel of goods, which were afterwards to be mixed in the common adventure on board the ship, and till that admixture the partnership in the goods did not arise."

And Bayley J, after describing *Saville v. Robertson* (3) in the same way says:—

"But here as soon as the goods were purchased, the interest of the three attached in them at the same instant by virtue of the previous agreement."

Mr. George Joseph Bell, in his celebrated Commentaries on the Principles of Mercantile Jurisprudence, after stating that the law of Scotland is the same as the law of England in this matter, quotes the judgment of Lord Ellenborough as correctly laying down the law, citing, *inter alia*, a case of *Cunningham v. Kinnerar* (4), on the same lines as *Gouthwaite v. Duckworth* (5), which was affirmed in the House of Lords in 1765, and the whole matter is comprehensively expressed in his Principles, Section 395, in words which their Lordships think accurately give the result of the cases both old and modern.

"Where goods are purchased or money raised for the joint adventure, and the dealing though ostensibly by an individual is truly and substantially a dealing of the joint adventure, the adventurers are liable as partners. But there is no such responsibility for goods, &c., purchased on the credit of an individual adventurer previously to the contract though afterwards brought into stock as his contribution....."

It may be and often is a difficult matter to say on which side of the line thus indicated the facts of a particular case fall,

and cases will be found illustrating both results. To the cases already cited may be added the case of *Heap v. Dobson* (6), while in the Scottish Courts may be taken as on the lines of *Gouthwaite's case* (5), the case of *British Linen Co. v. Alexander* (7), (where the facts are strikingly similar to the present case, and on the lines of *Saville* (3) and *Heap's cases* (6), *White v. McIntyre* (8).

Their Lordships are aware that Lord Lindley, in his capacity as an author but not as a Judge, expressed some doubts as to whether the case of *Gouthwaite v. Duckworth* (5), could be supported. They are of opinion that, whether that doubt is sound or not, it is not a criticism on the criterion of law indicated by Lord Ellenborough and the other Judges; but is only an indication that a different view might have been taken of the facts of that particular case.

Turning then to the present case, their Lordships have come to the conclusion that the judgment of the trial Judge was correct. The considerations which lead them to that result are as follows:

It is clear from the terms of the agreement that either of the two partners by the mere fact of purchase (after consultation as to price) could subject any sugar independently of the action of the other to becoming partnership sugar. A purchase of sugar therefore becomes a purchase for the partnership, and any one who sold the sugar, or advanced money by which the sugar was bought, was crediting the partnership with goods or money. This is further accentuated by the provision as to possible resale in Mauritius itself. If either party in the case bought sugar, and then came to resell it in terms of that article, he could not refuse his co-adventurer a share of the profit he made. These considerations make it impossible to say, as was said effectively in *Saville v. Robertson* (3), or *Heap v. Dobson* (6), that the joint adventure only began when the goods were shipped, as it is clear that the joint adventure began as regards each parcel from the moment that parcel was bought. The learned Judges of the Court of Appeal are impressed with the view that the agreement is

(3) [1792] 4 Turn. Rep. 720.

(4) [1764] 2 Pat. App. Cas. 114.

(5) [1810] 12 East. 421.

(6) [1863] 15 C. B. (N. S.) 460=137 R. R. 602.

(7) [1858] 15 D. 277.

(8) [1841] 3 D. 334.

"elaborately drawn for the purpose of keeping the interests of the two shippers distinct...except in so far as a combination between them was desirable for the purpose of securing joint shipments and a sale of the sugar at Hongkong." Their Lordships cannot take this view. It ignores the fact that notwithstanding the separate shipment and consignment documents, the sugar was admittedly to be accounted for as partnership sugar. Supposing that the particular parcels consigned by one had in some way been deteriorated, either by perils of the sea, without insurance, or by the development of some intrinsic fault, it is perfectly clear that the other party would have had to bear his share of the loss resulting in the whole cargo. No doubt the anxious arrangements for shipping and consignment in separate names were peculiar. But the reason for them is amply explained by the fact that the parties desired secrecy, being afraid at Mauritius of the hostile action in breaking prices of a rival whose astuteness they deplorably acknowledged.

Moreover, it is clear not only that the facts as to the terms of a partnership in the sugar shipped are as have been stated, but that the plaintiff knew the whole terms and conditions of the agreement. He knew therefore he was helping by advance of credit the partnership in its purchase of sugar. The learned Appeal Judges say that the respondent Karim did not avail himself of the plaintiff's credit. That that credit was not interposed in the precise way originally contemplated by the 4th article of the agreement is true. But that they did not in fact avail themselves of the plaintiff's credit is obviously an error. The bills speak for themselves. When a drawer discounts an acceptance which acceptance is given at a time when the acceptor owes no money to the drawer, it is idle to say that the drawer does not avail himself of the acceptor's credit; and if anything more was wanted it is to be found in the evidence of Karim himself, who admits in cross-examination, "For the purchase of all that sugar neither I nor Rashid paid a rupee; it was all paid for by hundis accepted by the plaintiff."

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed and the judgment of

the Trial Judge restored: the defendant Karim paying costs in the Courts below and before this Board.

T. S. N.

Appeal allowed.

Solicitors for Appellant — Ashurst, Morris, Crisp and Co.

Solicitors for Respondent No. 1—Latteys and Hart.

A. I. R. 1914 Privy Council.

(FROM ALLAHABAD.)

12th May, 1914.

LORDS MOULTON, AND PARKER OF WADDINGTON, SIR JOHN EDGE AND MR. AMEER ALI.

Sheo Shankar Ram and others—Plaintiffs-Appellants

v.

Mt. Jaddo Kunwar and others—Defendants-Respondents.

(a) *Hindu Law*—Joint family—Manager effectively represents it in all proceedings—Foreclosure decree against manager—No suggestion that manager did not act in the interests of family—T. P. Act, S. 85 not applying—Other members are bound by decree—Civil P. C. 0.34, R. 1.

There are occasions, including foreclosure actions when managers of joint Hindu families so effectively represent all other members of the family that the family as a whole is bound.

[P. 137, C. 2.]

The Court is not bound to set aside execution proceedings where substantial justice has been done merely because every existing member of the family was not formally a party to the suit, where there is not the slightest ground for suggesting that the managers did not act in the interest of the family and no question arises under Section 85 of the Transfer of Property Act, 1882, because the mortgagee had no notice of interests of the other members.

[P. 137, C. 2.]

DeGruyther and B. Dube—for Appellants.

E. Richards and G. R. Lowndes—for Respondent No. 1.

Lord Moulton :—This is an appeal from a judgment and decree of the High Court of Judicature for the North Western Provinces, Allahabad, which reversed a decree of the Court of the Subordinate Judge of Ghazipur. The matter in issue is whether the plaintiffs or some of them are entitled to redeem the mortgaged properties in suit, or whether they are bound by certain foreclosure decrees, dated the 27th March, 1895, which were followed by orders absolute, dated the 3rd

April, 1897, upon which possession was taken in August, 1897.

So far as is necessary to make clear the question in issue, the facts of the case are as follows. The first and principal respondent, *Musammatt Jaddo Kunwar*, was the mortgagee of certain properties under a mortgage, dated the 16th of September, 1887, and of certain other properties by a mortgage of the 6th January, 1891. In 1895 she brought suits to foreclose those mortgages. But in the interval, *Hira Ram* and *Dhundha Ram*, members of a joint Hindu family, had acquired interest in the mortgaged properties partly by purchase and partly by obtaining a usufructuary mortgage. Both these interests were of course subordinate to the mortgage to *Musammatt Jaddo Kunwar*. Although *Hira Ram* and *Dhundha Ram* acquired these interests in their own name, they were in fact acquired by them on behalf of the joint family, although the respondent *Musammatt Jaddo Kunwar* had no notice of this fact at any time material to the question in this action.

Hira Ram and *Dhundha Ram* were made parties to the foreclosure actions by *Musammatt Jaddo Kunwar* as parties interested in the mortgaged properties, and the foreclosure decrees were pronounced against them. They did not make any attempt to avail themselves of their right to redeem, so that the order absolute was pronounced against them. They were at the time of acquiring the properties and also at all material times in the foreclosure suits the managers of the joint family, and they acted as such, both in acquiring the properties and in abstaining from redeeming them. The appellants, the plaintiffs in this suit, are other members of the joint family, and they claim that they were, as such members, interested in the mortgaged properties at the time of the foreclosure suits, and that they ought to have been joined therein as parties, and that inasmuch as they were not so joined the foreclosure decrees do not bind them, and they are entitled now to redeem. The Subordinate Judge found in their favour on this point of principle, but held that they were entitled to redeem their own properties only and not the entire properties comprised in the said mortgages. On appeal to the High Court of Judicature it was

held that they were bound by the foreclosure decrees on the ground that the joint family was effectively represented in the suit, and that in such case the Court is not bound to set aside the execution proceedings where substantial justice has been done merely because every existing member of the family was not formally a party to the suit.

There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions, including foreclosure actions, when the managers of joint Hindu family so effectively represent all other members of the family that the family as a whole is bound. It is quite clear from the facts of this case and the findings of the Courts upon them that this is a case where this principle ought to be applied. There is not the slightest ground for suggesting that the managers of the joint family did not act in every way in the interests of the family itself, and no question arises under Section 85 of the Transfer of Property Act, 1882, because the mortgagee had no notice of the plaintiffs' interest. Their Lordships have therefore no hesitation in deciding that there is no reason for interfering in the decision of the High Court. They will, therefore, humbly advise His Majesty that this appeal should be dismissed and that the appellants should pay the costs.

T. A. R.

Appeal dismissed.

Solicitors for Appellants — Douglas Grant.

Solicitors for Respondent No. 1 — T. L. Wilson and Co.

**** A. I. R. 1914 Privy Council.**
(FROM MADRAS)

4th March, 1914.

LORDS MOULTON AND SUMMER,
SIR JOHN EDGE AND MR. AMEER ALI.
Chidambaram Chettiar—Appellant

v.

Srinivasa Sastrial and others—Respondents.

On Appeal from the High Court at Madras.

**** T. P. Act, S. 53—Assignment of rights under decree—S. 53 does not apply directly as subject-matter of assignment is not immoveable property—Question to be decided by reference to equity Justice and good conscience—Assignment partly a device to defeat**

creditors—Assignment is entirely invalid against creditors affected.

A sum of Rs. 14,000 was held in deposit by a Court to the credit of a decree-holder, S. S. assigned his rights under the decree to one A. The consideration recited in the deed was recited to be Rs. 15,000. Out of this sum, the High Court held that about Rs. 8,000 was really applied to the payment of debts due by S. The balance also was stated to have been applied to the payments of debts due by S. one of these debts being that due to one Chidambaram, but the High Court held the statement to be false. The High Court held that to the extent of that balance, the arrangement was a device intended to defeat the other creditors of S.

On these facts, the High Court held

(i) That the property sought to be assigned not being immoveable property, Section 53 of the Transfer of Property Act had no direct application, and the question fell to be decided on general principles of equity, justice and good conscience. [P. 139, C. 1.]

(ii) A deed is void against creditors, when the debtor is in a state of insolvency or when the effect of the deed is to leave the debtor without the means of paying his present debts. If this is the condition of the debtor or the consequence of his act it is not sufficient to render a deed valid, that it was made on good consideration for a good consideration does not suffice if it be not also *bona fide*. [P. 139, C. 2.]

(iii) Under Statute 13 Elizabeth Clause 5 and Section 53 of the Transfer of Property Act "good faith" and "consideration" are in terms made essential conditions to the validity of a transfer and mere "good consideration" does not suffice. [P. 139, C. 2.]

(iv) There is of course nothing in the Statute of Elizabeth or Section 53, Transfer of Property Act to prevent a creditor getting a preference provided nothing more is done by the transaction either with reference to the transferor or transferee so as to injuriously affect the creditors of the former. [P. 140, C. 1.]

(v) Thus the deed being invalid *in toto* as being a device to defeat Swami Iyer's other creditors, it cannot be treated as partly valid and it was open to the assignee to protect himself by discharging the claims of S's other creditors at whose instance the transaction was voidable.

Held, (by the P. C.) that the decision of the High Court was correct.

FACTS will be clear from the following judgment of the High Court of Madras.

These appeals raise the question of the validity of the assignment of a decree obtained by one Swami Iyer in O. S. No. 12 of 1899 on the file of the Subordinate Court of Kumbakonam to one Annamalai Chetti through whom the appellant claims as against other creditors of Swami Iyer who are the respondents.

The facts are that a sum of over Rs. 14,000 was held in deposit by the Court to the credit of Swami Iyer as decree-holder in O. S. No. 12 of 1899. Swami Iyer was himself indebted to various persons and some of them obtained decrees against him for the sums due. Annamalai Chetty was one of the decree-holders (O. S. No. 93 of 1899) and he obtained Exhibit A, dated the 28th March, 1900, from Swami Iyer, whereby the latter purported to assign to him his rights under the decree in O. S. No. 12 of 1899. The consideration for the assignment recited in the deed, *viz.*, Rs. 15,000 was stated to consist of (1) Rs. 4,390 principal interest and costs due to Annamalai's firm under the decree already referred to (O. S. No. 93 of 1899), (2) Rs. 1,650 or so due to Lakshmana Chetty in suit No. 65 of 1899, (3) Rs. 1,185 due to Srinivasa Ayyar under promissory note C (4) a cash payment of Rs. 7,775 before the Sub-Registrar.

Though the last mentioned sum was paid before the Sub-Registrar, admittedly Annamalai took back the amount and on the 3rd April, 1900 he and Swami Ayyar entered into an arrangement which purports to be set out in Exhibit D. According to it Rs. 610 was paid to Swami Iyer himself, Rs. 270 to one C. Krishnaswami Iyer, Rs. 57 into Court, Rs. 1,000 to the present appellant, Chidambaram Chetti and Rs. 5,838 to a dancing girl named Balamani.

There is no doubt that the sums of Rs. 4,390 and Rs. 1,650 stated to have been paid to the decree-holders were really due and they entered satisfaction for the same. The Subordinate Judge in effect found that the payment to C. Krishna-swami Iyer was also due, and we think that the weight of evidence is in favour of the view that the sum of Rs. 1,185 was due, and was paid, to K. Srinivasa Iyer.

But as regards the remainder (over Rs. 7,000) we agree with the Subordinate Judge that the case set up on behalf of the appellant is fictitious. Rs. 5,838 is said to have been paid to Balamani on account of money borrowed from her by Swami Iyer.

The sole evidence in support of the plea is the statement of Balamani herself. Her evidence is vague and indefinite and is entirely unsupported by any accounts or vouchers and it is highly improbable in

view of the relation existing between them, that she would have lent any money, or at all events so large a sum to Swami Iyer.

We are equally satisfied that no money was due to Chidambaram. We think that there can be no doubt that the arrangement effected by the assignment though partly entered into for the purpose of discharging debts really due by Swami Iyer, was also clearly intended to secure a sum of over Rs. 7,000 to the assignor himself or to persons in whom he was interested but who were not his creditors. Admittedly, Swami Iyer was at that time in pecuniary embarrassments. His only property was the sum to his credit in C. S. No. 12 of 1899. The assignment, therefore, operated to screen some 50 per cent. of his assets from being taken by his other creditors. Annamalai admits that he knew of the existence of those other creditors and that they were pressing for payment. On the very day of the alleged arrangement with Swami Iyer, and on the following day two of these creditors obtained orders for the attachment before judgment of the sum to the credit of Swami Iyer in C. S. No. 12 of 1899 and other attachments were issued soon afterwards. Having regard to the fact that at this time Swami Iyer, Annamalai and Chidambaram Chetty were all paramours of the dancing girl Balamani and on friendly terms with each other we cannot doubt that the arrangement was, to the extent we have stated, a device intended to defeat Swami Iyer's other creditors.

In this view the next question for decision is whether the assignment to Annamalai is valid as against the respondents.

The property sought to be assigned not being immoveable property, Section 53 of the Transfer of Property Act has no direct application and we must decide the question by a reference to general principles of justice, equity and good conscience. As observed by the Judicial Committee of the Privy Council in *Corlett v. Radcliffe* (1).

"Each case must depend upon its own circumstances and in all the question is one of fact, whether the transaction was *bona fide* or was a contrivance to defraud creditors."

It may, however, be stated generally that a deed is void against creditors when the debtor is in a state of insolvency or when the effect of the deed is to leave the debtor without the means of paying his present debts. If this is the condition of the debtor or the consequence of his act, it is not sufficient to render a deed valid that it should be made upon good consideration, for as it is said in *Twyne's case* (3 Co. 82) "a good consideration does not suffice if it be not also *bona fide*." This statement of the law is sufficient to support the conclusion of the Subordinate Judge that the assignment was invalid. As, however, Mr. Krishnaswami Iyer on behalf of the appellant strongly contended that the last paragraph of Section 53 of the Transfer of Property Act as interpreted by this Court in *Ramasami Pillai v. Adinarayana Pillai* (2), warrants a different view being taken we shall briefly deal with his contention. In effect his contention is that wherever there is any real consideration however small, for the transfer, the question of intention is immaterial and the transaction must be held to be one entered in good faith and therefore not invalid as against creditors either under the Statute, 13 Elizabeth, Clause 5, or under Section 53 of the Transfer of Property Act, even though it was in fact intended to delay or defeat creditors and had the intended effect. This contention is, we think, on the face of it unsustainable for the simple reason that under both enactments good faith as well as consideration is made, in terms, an essential condition of the validity of the transfer. This has been pointed out again and again both in the decisions of the Courts and by the text-writers referred to by Mr. Sivaswami Iyer in his reply for the respondents. See *Corlett v. Radcliffe* (1), already cited, *Bott v. Smith* (3), *In re Johnson - Golden* (4), *Ex parte Chaplain*. *In re Sinclair* (5), *Ex parte Johnson*. *In re Chapman* (6) *Smith's Leading Cases*, Eleventh Edition, Volume I, pages 16 and 17, *May's Fraudulent Transfers* (May on Fraudulent and Voluntary Dispositions of property) page 85. See also *Ranchdhooldas v. Chunilal*

(2) 20 M. 465.

(3) 21 Beav. 511; S. C. 52, E. R. 957.

(4) 20 Ch. D. 389 (392).

(5) L. R. 26 Ch. D. 319.

(6) 26 Ch. D. 338 (251) Per Fry, L. J.

(1) 14 Moo. P. C. 121; S. C. 15, E. R. 251.

(7). As regards the passage at page 466 of the case reported in 20 Madras, the Judges appear to have merely intended to repeat the language of Thesiger, L. J. in *Ex parte Games* (8), which again refers to *Allen v. Bonnett* (9).

In neither of these two cases was the statement intended to give an exhaustive explanation of the term *bona fide* in connection with such transactions. In both, the Judges, were dealing with mortgages, and what they said was that where a mortgage was granted for a sum really due, the transaction could not be impeached except upon the ground that the transaction though in form a mortgage, was in truth a trust in favour of the debtor and thus a mere cloak to secure an advantage to him.

In effect they were referring to the condition of things which was dealt with by Lord Coke in *Twyne's case* when he said thus :

"If a man be indebted to five several persons in the several sums of £20, and hath goods of the value of £20 and makes a gift of all his goods to one of them in satisfaction of his debt, *but there is a trust between them* that the donee shall deal favourably with him in regard of his poor estate, either to permit the donor or some other person for him or for his benefit to use or have possession of them, and is contented that he shall pay him his debt when he is able; this shall not be called *bona fide* within the said proviso; for the proviso, saith on a good consideration and *bona fide*; so a good consideration doth not suffice if it be not also *bona fide*."

It is scarcely necessary to add that there is nothing in the statute of Elizabeth or in Section 53, Transfer of Property Act, to prevent a creditor getting a preference provided nothing more is done by the transaction either with reference to the transferor or transferee so as to injuriously affect the creditors of the former. Another argument of Mr. Krishnaswami Iyer for the appellant was that to the extent of payments made by Annamalai on behalf of Swami Iyer's creditors the assignment should be held good and the appellant should be allowed to execute the decree as if he were a joint creditor with Swami Iyer. We cannot accede to this argument.

The transaction being entirely invalid as against the creditors, we cannot allow it to be treated as partly valid. It is

open to the appellant to protect himself by discharging the claims of Swami Iyer's other creditors at whose instance the transaction is voidable.

We, therefore, dismiss both the appeals with costs.

DeGruyther and *K. Brown*—for Appellant.

Lord Moulton :—Their Lordships are of opinion that the two decisions appealed against are correct; that the High Court acted rightly in setting aside the two assignments, the one to Annamalai and the other to Chidambaram, and that no valid proceedings can therefore be based on either of those assignments. The question whether any of the parties can establish rights based, not on the assignments, but on other grounds, such as the actual payment of debts, is a point which was, in their Lordships' opinion, not before the Courts below, and is not before their Lordships, and on that point therefore they pronounce no opinion.

Their Lordships will, therefore, humbly advise His Majesty that these appeals should be dismissed.

S. A. R. *Appeals dismissed.*

Solicitors for Appellant—Chapman, Walker and Shephard.

****A. I. R. 1914 Privy Council.**

(FROM CALCUTTA.)

19th May, 1914.

LORDS SHAW AND MOULTON, SIR JOHN EDGE AND MR. AMEER ALI.

Maha Prasad Singh and others—Appellants

v.

Ramani Mohan Singh and others—Respondents.

Privy Council Appeals Nos. 9, 10 and 11 of 1911.

*(a) *Practice—Plea—Point not raised in memo of appeal—Point relating to jurisdiction of Trial Court and not depending on disputed facts was entertained in argument before Privy Council—Jurisdiction.*

In the hearing before the Trial Court, an issue was raised as to the jurisdiction of that Court to entertain the suit, and the point was again raised before their Lordships of the Privy Council.

(7) 5 Bom. L. R. 213.

(8) L. R. 12 Ch. D. 314.

(9) L. R. 5 Ch. 577.

Held, that, seeing that it was a question of jurisdiction, and depended on no disputed facts, the point should be entertained although it was not specifically raised on the appeal, more especially as it necessarily presented itself in the argument. [P. 143, C. 1.]

(b) *Sonthal Parganas—Law applicable to—General law does not apply—There is special legislation—Lieutenant-Governor of Bengal can vary the legislation by Gazette notification.*

The position of the Sonthal Parganas is very peculiar. They are under separate and special legislation which differs widely from the legislation applicable to the rest of Bengal. The Lieutenant-Governor of Bengal has the power to vary that legislation from time to time by notifications published in the Calcutta Gazette under and according to the provisions appearing in the Regulations relating to the district. [P. 143, C. 1.]

(c) *Sonthal Parganas Act 37 of 1855—Effect was to vest administration of civil justice in officers appointed under the Act—Interpretation of the proviso—Difference between proviso and exception—Proviso should be taken together with language of previous portion—Suits mentioned in the proviso should be tried only by the special officers—Interpretation of statutes.*

The language of Act No. 37 of 1855 is perfectly general in its character and under it the whole administration of civil justice became vested in the officer or officers appointed by the Lieutenant-Governor of Bengal under the Act. [P. 143, C. 2.]

The proviso to the above enactment (being a proviso and not an exception, and accordingly taken in connection with the general language of the previous portion of the clause), should be construed as providing that the special officer or officers shall try the suits mentioned in the proviso but that in trying and determining them they shall observe the General Laws and Regulations obtaining in Bengal, which but for the Act would have applied equally in Sonthal Parganas. 10 C. 761 Disapproved. [P. 144, C. 1.]

(d) *Civil P. C., (1859), S. 385—Description in section applies to Sonthal Parganas—Extension of Civil P. C., in 1867 removed the doubt as to whether ordinary Civil Courts could try suits exceeding Rs. 1,000 in value—Sonthal Parganas.*

The Sonthal Parganas not being specially named in the Civil Procedure Code of 1859, the Act did not *prima facie* apply to them. But regard must be had to the language of Section 385 which provided that the Act should not apply to territories not subject to the General Regulations of Bengal, Madras and Bombay, until the same shall be extended thereto by the Government by Gazette notification. [P. 144, Cols. 1 & 2.]

Although the words "Sonthal Parganas" do not appear in Section 385 of the Code of Civil Procedure of 1859, the district falls under the description there appearing. [P. 144, C. 2.]

By a notification of 19th August 1867, the Civil Procedure Code of 1859 as amended by the Civil Procedure Code 1861 was applied to the Sonthal Parganas.

Held, that it can hardly have been intended that the notification should apply to the Courts held by the officers appointed by the Lieutenant-

Governor of Bengal in those suits in which they were not required to try and determine the case according to the general laws and regulations prevailing in Bengal. But with regard to Civil suits in which the matter in dispute exceeded the value of Rs. 1,000, it would seem to have settled the doubt as to whether they were cognizable by ordinary Civil Courts established with jurisdiction within the Sonthal Parganas, because the fact that such jurisdiction exists in such Courts is recognised in subsequent registration. [P. 144, C. 2.]

(e) *Sonthal Parganas Settlement Regulation (1872)—Effect—Civil P. C., of 1859 and of 1861 thereafter applied only to suits exceeding Rs. 1,000 in value and tried in Courts established under Act 6 of 1871—Policy of Regulation—S. 5 has the effect of depriving Courts established under Act 6 of 1871, of jurisdiction to try suits for land exceeding Rs. 1,000.*

As an effect of the Sonthal Parganas Settlement Regulation of 1872, the Civil Procedure Codes of 1859 and 1861 were thereafter applicable in the Sonthal Parganas only so far as concerns the trial and determination of civil suits in which the matter in dispute exceeded the value of Rs. 1,000 when such suits were tried in the Courts established under Act 6 of 1871.

The Bengal Civil Courts Act (6 of 1871) was not in the schedule to the Sonthal Parganas Settlement Regulation (1872), enumerating the Acts, which were thenceforth to apply in the Sonthal Parganas. But the Bengal Civil Courts Act of 1871 was passed at a date when the Civil Procedure Code was in force in the Sonthal Parganas, and it would seem as though the wide provisions of the clauses in the Civil Procedure Code, giving jurisdiction to Civil Courts must be taken to have given to the Government power to appoint Judges under it within the Sonthal Parganas inasmuch as Section 4 of the Sonthal Parganas Regulation, 1872 provided that the Lieutenant-Governor might invest any competent officer with the powers of a Court established under Act 6 of 1871 and might also divest any Court established under that Act, of its jurisdiction.

Section 5 of the Sonthal Parganas Settlement Regulation, 1872, must be construed as excluding from the jurisdiction of Courts established under Act 6 of 1871, suits relating to land whose value of matter in dispute is more than Rs. 1,000 until the land is settled and such settlement is notified in the Gazette.

(f) *Sonthal Parganas Regulation (1872), S. 6—"Courts having jurisdiction in Sonthal Parganas" does not mean only Courts dealing with matters purely local.*

The expression "All Courts having jurisdiction in the Sonthal Parganas" by Sonthal Parganas Regulation, 1872 Section 6, does not mean only Courts locally situated in the Sonthal Parganas and dealing with matters purely local. It includes Courts having jurisdiction in the Sonthal Parganas and acting under and by virtue of such jurisdiction.

(g) *Sonthal Parganas Settlement Regulation (1872), S. 6—Provision is not one of mere procedure but is one of substance.*

Section 6 of the Sonthal Parganas Settlement Regulation of 1872 is not a provision merely of

procedure but is one of substance, and so far as the Courts having jurisdiction within the Sonthal Parganas are concerned it places all contractual stipulations as to compound interest in a position of non-enforceability and limits statutorily the total interest which can be decreed on any loan or debt.

(h) *Sonthal Parganas Justice Regulation (1872), S. 9—Words of exclusion in, refer to S. 5 of Regulation of 1872.*

The words of exclusion in Section 9 of the Sonthal Parganas Justice Regulation, 1893 refer to Section 5 of the Sonthal Parganas Settlement Regulation of 1872.

(i) *Sonthal Parganas—Suit on mortgage of land partly settled and partly unsettled, can be tried only by officer appointed by Lieutenant-Governor under Sonthal Parganas Act, 1855 and Sonthal Parganas Justice Regulation Act (1893)—Rules relating to usury, contained in S. 6 of the Sonthal Parganas Settlement Regulation, 1872 are binding on all Courts.*

A mortgage-suit was filed in the Court of the Subordinate Judge at Bhagalpur in Bengal on 20—6—1904.

The mortgagors resided and the chief part of the property was situate in the Sonthal Parganas.

Held, on an examination of the Acts and Regulations applicable to the Sonthal Parganas, that at the date of the suit, no suit could lie in any Court established under Act VI of 1871 (the Bengal Civil Courts Act,) or under the Act which has taken its place, *viz.*, the Bengal United Provinces and Assam Civil Courts Act (1887) in regard to any land or any interest in or arising out of any land, or for the rent or profits of any land, but such suits must have been brought before settlement officers or Courts of officers appointed by the Lieutenant-Governor of Bengal under Section 2 of the Sonthal Parganas Act, 1855 and the Sonthal Parganas Justice Regulation Act, 1893, Part 2, so long as the land had not been settled and the settlement declared by a notification in the Calcutta Gazette, to have been completed and concluded. The same rule holds good also where the suit land is partly settled and partly not settled. And, further, that whatever be the Court that has jurisdiction to decide cases within the Sonthal Parganas, and is exercising that jurisdiction, it must observe the rules relating to usury contained in Section 6 of the Sonthal Parganas Settlement Regulation, 1872 and must refuse to decree any compound interest arising from any intermediate adjustment of interest, or an amount of total interest exceeding the principal or original debt or loan.

(j) *Jurisdiction—Absence of—Consent of parties does not create jurisdiction.*

Parties cannot by their consent give the Court a jurisdiction which is denied to it by law.

G. R. Lowndes—for Appellants.

Robert Finlay, DeGruyther and A.M. Dunne—for Respondents.

Lord Moulton :—In this case their Lordships have to deal with three consolidated appeals from decrees of the High Court of Judicature at Fort Wil-

liam in Bengal, arising out of the mortgage-suit filed in the Court of the Subordinate Judge at Bhagalpur in Bengal. The first and principal appeal is from the decree of the Subordinate Judge enforcing the mortgage, which was affirmed on appeal by the High Court. Subsequently to making that decree the Subordinate Judge made two orders varying the same both of which were on appeal set aside by the High Court. From these two orders of the High Court appeals have been brought by the respondents to the main appeal, and they constitute the second and third of the consolidated appeals.

The mortgage-bond, to enforce which the action was originally brought, was a bond for Rs. 3,50,000 dated the 21st December, 1896, in favour of Babu Suraj Narayan Singh, the father of the principal respondent, and secured on lands situated in the Sonthal Parganas, and elsewhere. The mortgagors were members of a joint Hindu family. Inasmuch as no question arises in this appeal as to the parties to the present action being the proper parties, it will be convenient to call the appellants in the principal appeal the mortgagors and the respondents the mortgagees.

The bond sued on was the last of a series of bonds for increasing amounts. The total of the principal amounts advanced was, according to the statements in the plaint, Rs. 2, 85,903-1-9. But the total claim of the mortgagees at the date of suit was Rs. 5,36,038-11-10, the balance being made up of interest which was charged according to the provisions of the different bonds, the rate under the bond in suit being 7½ per cent. per annum with annual rests. By far the greater portion of the mortgaged properties was situated in the district of the Sonthal Parganas, and the mortgagors resided in that district. The remainder of the mortgaged property was situated within the local jurisdiction of the Bhagalpur Court.

The bond in suit was executed at Bhagalpur and contained a stipulation that the mortgagees might enforce it in the Bhagalpur Court.

The suit was commenced on 20th June, 1904. The plaint shows that it was an ordinary suit to enforce a mortgage. Written statements of defence were put in by various defendants and various issues were raised and decided by the

Subordinate Judge at the trial. Most of these relate to matters no longer in dispute. The only issues that remain for their Lordships, decision in this appeal turn on the fact that the mortgagors reside and the chief part of the property is situate in the Sonthal Parganas, so that it is not necessary further to refer to the other issues.

The Judgment of the Subordinate Judge, which is dated 12th February, 1906, was in favour of the mortgagees on all issues. On the appeal to the High Court the argument seems to have been confined to the sixth issue, which was in the following term:—

"Are the plaintiffs precluded from claiming compound interest, or interest exceeding the amount of the principal advanced under Regulation III of 1872."

The High Court found in favour of the mortgagees on this issue, and from that decision the present appeal is brought. But in the hearing before the Subordinate Judge an issue was raised as to the jurisdiction of the Court of Bhagalpur to entertain the suit, and this point has again been raised in the argument before their Lordships. Seeing that it is a question of jurisdiction, and depends on no disputed facts, their Lordships are of opinion that they cannot decline to entertain it, although it is not specifically raised on the appeal, more especially as it necessarily presented itself in the argument.

The position of the Sonthal Parganas is very peculiar. They are under separate and special legislation, which differs widely from the legislation applicable to the rest of Bengal. The Lieutenant-Governor of Bengal has the power to vary that legislation from time to time by notifications published in the Calcutta Gazette, under and according to provisions appearing in the Regulations relating to the district as will presently be more particularly referred to. At the hearing of the appeal it was found that the documents in the record did not adequately inform their Lordships of the relevant notifications which had thus appeared in the Calcutta Gazette, and, accordingly, it was arranged that the parties should supplement the record by putting in copies of such notifications as they thought material. These were furnished to their Lordships in December last,

and they affect to an important degree the matters in issue, and more particularly those that turn upon the settlement of the lands to which the mortgage bond relates.

In order to make clear the legal questions that arise in this appeal, it is necessary to explain the nature and sequence of the legislation relating to the Sonthal Parganas.

The special legislation for the Sonthal Parganas commence (by an Act of the Governor-General of India in Council, No. XXXVII of 1855, which was passed on 22nd December, 1855. Its full title is:—

"An Act to remove from operation of the General Laws and Regulations certain districts inhabited by the Sonthals and others and to place the same under the superintendence of an officer to be specially appointed for that purpose."

The preamble of the Act recites that the General Regulations and Acts of Government then in force in the Presidency of Bengal were not adapted to the uncivilised race of people called Sonthals, and it was therefore deemed expedient to remove from the operation of such laws certain districts. It then proceeded to enact by Clause 1, as follows:—

"The districts described in the Schedule to this Act are hereby removed from the operation of the General Regulation of the Bengal Code and of the Laws passed by the Governor-General of India in Council except so far as is hereinafter provided and no law which shall hereafter be passed by the Governor-General of India in Council shall be deemed to extend to any part of the said districts unless the same shall be specially named therein."

This is subject to a proviso which is not material to this case.

The Act then proceeds to carry out its main object by the following enactment:—

"The said districts shall be placed under the superintendence and jurisdiction of an officer or officers to be appointed in that behalf by the Lieutenant-Governor of Bengal. . . . The administration of civil and criminal justice, . . . are hereby vested in the officer or officers so appointed."

This language is perfectly general in its character, and under it the whole administration of civil justice became vested in the officer or officers so appointed. But there follows a proviso to which frequent reference was made in the argument. It reads as follows:—

"Provided that all civil suits in which the matter in dispute shall exceed the value of Rs. 1,000, shall be tried and determined accord-

ing to the General Laws and Regulations in the same manner as if this Act had not been passed."

The interpretation of this provision is a matter of great difficulty. Two rival interpretations naturally suggest themselves. The one is that the officers exercising the jurisdiction shall do so in accordance with the general laws and regulations, so that the rights of the parties are unaffected by the provision, although they are to be pronounced upon by a different judicial tribunal. The other is that not only the laws that govern rights, but also the procedure to enforce those rights is to remain unchanged. Now it must be observed that this is a proviso and not an exception, and accordingly, taken in connection with the general language of the previous portion of the clause, the former of these two interpretations is the one that commends itself to their Lordships, so that it must be construed as providing that the special officer or officers shall try such suits, but that in trying and determining them they shall observe the General Laws and Regulations obtaining in Bengal, which but for the Act would have applied equally in the Sonthal Parganas. It would seem, however, that the other view has been taken in India: see the judgment in *Sorbojit Roy v. Gonesh Prosad Misser* (1). Subsequent legislation has, however, rendered it unnecessary, so far as the decision in this case is concerned, to decide what would be the state of things if this Regulation were still in force unmodified by any other statutory enactments.

The territorial definition of the Sonthal Parganas was originally to be found in the schedule to this Act; but, by Act X of 1857, a new schedule was substituted therefor. The judgment of the High Court finds that two-thirds of the mortgaged properties are situated within the district described in that schedule, and it would seem that this estimate may be assumed to be approximately correct for the purposes of this appeal.

The next Act in chronological order to which it is necessary to refer is the Code of Civil Procedure of 1859. The Sonthal Parganas are not specially named in that Act, and therefore, it did not *prima facie*

apply to them, but, nevertheless, we must have regard to the language of Section 385 of that Act, which reads as follows:—

"This Act shall not take effect in any part of the territories not subject to the General Regulations of Bengal, Madras and Bombay, until the same shall be extended thereto by the Governor-General of India in Council or by the Local Government to which such territory is subordinate and notified in the Gazette."

Although the words "Sonthal Parganas" do not appear in this section the district falls under the description there appearing. Accordingly, we find that by a notification on 19th August 1867, the Code of Civil Procedure, 1859, as amended by the Code of Civil Procedure, 1861, was applied to the Sonthal Parganas subject to certain provisions, restrictions and exceptions which are not relevant to the matters of this suit.

It is not necessary to decide what was the precise effect of this notification. It can hardly have been intended that it should apply to the Courts held by the officers appointed by the Lieutenant-Governor of Bengal in those suits in which they were not required to try and determine the case according to the general laws and regulations prevailing in Bengal. But with regard to civil suits in which the matter in dispute exceeded the value of Rs. 1,000, it would seem to have settled the doubt as to whether they were cognizable by ordinary Civil Courts duly established with jurisdiction within the Sonthal Parganas because it will be found that the fact that such jurisdiction exists in such Court, is recognised in subsequent legislation.

In the year 1872 a new Regulation was passed for the Sonthal Parganas. It is entitled the Sonthal Parganas Settlement Regulation, and by Clause (2) it is directed to be read with Act XXXVII of 1855 and Act X of 1857 before referred to. Clause (3) reads as follows:—

"Subject to the provisions of this Regulation, the Regulations and Acts mentioned in the schedule annexed to this Regulation, or such portions of them as are unrepealed, shall be deemed to be in force in the Sonthal Parganas. No other Regulations or Acts shall be deemed to be in force in the Sonthal Parganas, except so far as regards the trial and determination of the civil suits mentioned in Section 2, Act XXXVII of 1855, in which the matter in dispute exceeds the value of Rs. 1,000, when such suits are tried in the Courts established under Act VI of 1871."

It further provides that the Lieutenant-Governor of Bengal may by notification

in the Calcutta Gazette add to, or take away from, the list in the schedule.

To arrive at the true meaning and effect of these provisions it is necessary to bear in mind that at the date of this Regulation the Code of Civil Procedure, 1859, as amended by the Code of Civil Procedure, 1861, applied to the Sonthal Parganas by virtue of the notification of 19th August, 1867. But the schedule to the Regulation does not contain the Civil Procedure Codes of 1859 and 1861, nor have they ever been added to the above list by any notification of the Lieutenant-Governor of Bengal as above described. It follows that these Civil Procedure Codes were thereafter applicable in the Sonthal Parganas only so far as concerns the trial and determination of civil suits in which the matter in dispute exceeded the value of Rs. 1,000 when such suits were tried in the Courts established under Act VI of 1871. So far as such suits were concerned there is nothing in this clause of the Sonthal Parganas Settlement Regulation to alter the effect of the Notification of 19th August, 1867, which applied to them—the Civil Procedure Code of 1859 as amended in 1861.

Act VI of 1871 is known as the Bengal Civil Courts Act, 1871. It is not in the scheduled list. But it was passed at a date when the Code of Civil Procedure, 1859, as amended by the Code of Civil Procedure, 1861, was in force in the Sonthal Parganas, and it would seem as though the wide provisions of the clauses in those Codes giving jurisdiction to Civil Courts must be taken to have given to the Government power to appoint Judges under it within the Sonthal Parganas, inasmuch as Section 4 of the Sonthal Parganas Regulation, 1872, provides as follows:—

“The Lieutenant-Governor of Bengal may, by notification in the Calcutta Gazette, invest any competent officer in the Sonthal Parganas with the powers of any Civil Court established under Act VI of 1871, and may exclude the whole or any part of the said Parganas from the jurisdiction of any of the Courts established under the said Act now having jurisdiction therein.”

But while it is evident that the Government by this section left it to the Lieutenant-Governor of Bengal to decide in future whether Courts established under the Bengal Civil Courts Act, 1871, should retain jurisdiction within the Sonthal Parganas, it had already made up its

mind that such should not be the case with suits relating to lands pending the completion of the settlement which they proposed forthwith to make of all the lands situated in the Sonthal Parganas. This is made clear by Section 5 which reads as follows:—

“Till such time as a settlement of the whole or any part of the Sonthal Parganas shall be made under the rules hereinafter provided, and the said settlement shall be declared by a notification in the Calcutta Gazette to have been completed and concluded, no suit shall lie in any Court established under the said Act VI of 1871 in regard to any land, or any interest in or arising out of any land, or for the rent or profits of any land, or regarding any village headship or other office connected with the land, except as hereinafter provided; but such suits shall be heard and determined by the officers appointed by the Lieutenant-Governor of Bengal under Section 2 of the said Act XXXVII of 1855, or by the Settlement Officers hereinafter mentioned, according as the said Lieutenant-Governor shall from time to time direct.”

Then follows a proviso by which the officer empowered to try a suit may transfer it to a Court established under the said Act, and thereby give to the Court jurisdiction to try it. No question, however, under this proviso, arises in the present case.

The critical question in this suit is as to whether Section 5 excludes from the jurisdiction of Courts established under the Bengal Civil Courts Act, 1871, suits relating to land where the value of the matter in dispute is more than Rs. 1,000. Their Lordships are of opinion that to this question only one answer can be given. The language of the section is so wide and so peremptory that it gives to the officers therein mentioned sole and exclusive jurisdiction in all suits in regard to any land, or any interest in or arising out of any land, or for the rent or profits of any land. To make the meaning clearer and to render the language more emphatic, it is expressed both in the positive and in the negative form. On the one hand it provides that “no suit shall lie in any Court established under the said Act VI of 1871 in regard to any land, etc., and on the other hand it provides that such “suits shall be heard and determined by the officers, etc.” It is impossible not to give to such language the full effect of creating an exclusive jurisdiction. It follows, therefore, that no action relating to land in the Sonthal Parganas can be brought otherwise than

before such officers so long as Section 5 is in force with respect to the district in which that land is situated. There is no difficulty in comprehending the motives for such legislation. The section shows that a settlement of the lands was in contemplation, and evidently the aim of the provision was to prevent any clash of jurisdiction between different Courts in matters relating to land until such time as the Government proclaimed the settlement to be completed—a very intelligible policy when it is considered that on the results of such suits between individuals might depend the entries which must be made in the settlement records.

The object of the Regulation being thus to throw the whole of the jurisdiction in suits relating to land into special Courts established in and for the Sonthal Parganas, and provision being made for extending that exclusive jurisdiction to all suits, one has to consider the meaning and effect of Section 6, which is the section upon which the rights of the parties in the present suit depend. That section, so far as is material, reads as follows:—

"All Courts having jurisdiction in the Sonthal Parganas shall observe the following rules relating to usury, namely:—

- (a) no compound interest arising from any intermediate adjustment of interest shall be decreed;
- (b) the total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan."

The respondents sought to establish that the phrase "all Courts having jurisdiction in the Sonthal Parganas" meant Courts locally situated in the Sonthal Parganas, and dealing with matters purely local. Their Lordships cannot accept this interpretation. The words are definite and precise, and must be applied in their natural signification. It was urged that, taken literally, they would apply to everything done by a Court having jurisdiction in the Sonthal Parganas, whether the matter related to those districts or not, inasmuch as the language used makes the application of the enactment depend on the Court and not on the matter in dispute. But this is to ignore the fact that the Regulation is only applicable to the Sonthal Parganas, and that,

therefore, it would not apply to Courts having jurisdiction wider than these local limits when such Courts were dealing with matters relating solely to other parts of India. The enactment therefore, applies to Courts having jurisdiction in the Sonthal Parganas, and acting under and by virtue of such jurisdiction.

The importance of the section is very great. It is a protective section clearly dictated by the fundamental consideration to which reference has already been made, and which led to the Sonthal Parganas being put under separate and special legislation, namely, that—

"The General Regulations and Acts of Government now in force in the Presidency of Bengal are not adapted to the uncivilised race of people called Sonthals, and it is, therefore expedient to remove from the operations of such laws," the districts known as the Sonthal Parganas.

The provision, therefore, is not one of procedure but of substance, and so far as the Courts having jurisdiction within the Sonthal Parganas are concerned, it places all contractual stipulations as to compound interest in a position of non-enforceability, and limits statutorily the total interest which can be decreed on any loan or debt. The application of these provisions to the facts of the present case will be considered later.

The next Act in chronological sequence to which reference was made in the argument is Act XIV of 1874, known as the Scheduled Districts Act, 1874. This is an Act for the purpose of removing doubts as to what Acts or Regulations are in force in parts of British India, which have never been brought within or have from time to time been removed from the operation, of the General Acts and Regulations and jurisdiction of the ordinary Courts of Judicature. These parts of British India are termed in the Act "Scheduled Districts." They are all set out in the First Schedule to the Act, and amongst them are to be found the Sonthal Parganas. The scheme of the Act is peculiar. It is expressly made to apply to all parts of British India other than the Scheduled Districts. But it is provided that it shall come into force in any scheduled district upon the issue of a notification under Section 3 of the Act with regard to such

district. In such case the local government may with the previous sanction of the Governor General in Council by notification in the Gazette of India, and also in the local Gazette declare (among other things) what enactments are actually in force in any of the scheduled districts, and every such notification shall be binding on all Courts of law. During the argument counsel for the parties were not in agreement as to whether any notification under this Act had been issued applying to the Sonthal Parganas; but from the subsequent information supplied to their Lordships, it would appear that no such notification has been issued, and therefore that the provisions of the Scheduled Districts Act, 1874, have never been applied to them. It is, therefore, unnecessary to discuss further the provisions of this enactment.

The next Act which requires to be noticed is the Civil Procedure Code, 1877. It repeals Act VIII of 1859 and Act XXIII of 1861, which constituted the then existing Code of Civil Procedure. Section 1 reads as follows:—

"This Act may be cited as 'The Code of Civil Procedure' and it shall come into force on the first day of October, 1877.

"This section and Section 3 extend to the whole of British India. The other sections extend to the whole of British India except the scheduled districts as defined in Act No. XIV of 1874."

The relevant part of Section 3 reads as follows:—

"The enactments specified in the First Schedule hereto annexed are hereby repealed to the extent mentioned in the third column of the same schedule.

"But when in any Act, Regulation or Notification passed or issued prior to the day on which this Code comes into force reference is made to Act VIII of 1859, Act XXIII of 1871, or 'The Code of Civil Procedure' or to any other Act hereby repealed, such reference shall so far as may be practicable be read as applying to this Code or the corresponding part thereof."

The effect of these sections is to make the notification of 1867 relative to the application of the then existing Codes of Civil Procedure to the Sonthal Parganas read as though it applied to the Civil Procedure Act, 1877. But it will be remembered that such application had been restricted by the Sonthal Parganas Regulation of 1872 to suits brought for amounts above Rs. 1,000 in Courts established under Act VI of 1871. The combined effect of these provisions must be

to make the Civil Procedure Act of 1877 apply in the Sonthal Parganas only to suits so brought.

The next Act is the Civil Procedure Code of 1882. In everything that is material to the present appeal this is identical with the Civil Procedure Code, 1877. It took the place of that Act in the Sonthal Parganas to the extent that such Act was in force therein, that is to say, for suits brought for amounts above Rs. 1,000 in Courts established under Act VI of 1871.

We now come to Regulation V of 1893, the short title of which is the Sonthal Parganas Justice Regulation, 1893. It made important changes in the administration of Civil Justice in the Sonthal Parganas. By Section 5 it added to the two classes of special Courts theretofore existing in the Sonthal Parganas, named the Courts of settlement officers and the Courts of officers appointed by the Lieutenant-Governor of Bengal under Section 2 of the Regulation of 1855, a third class namely, Courts established under Act XII of 1887, known as the Bengal United Provinces and Assam Civil Courts Act, 1887, which is an Act which has taken the place of Act VI of 1871 (which has been repealed), and all references to the last-mentioned Act must now be read as referring to it.

These definite provisions entirely remove the difficulties as to the jurisdiction within the Sonthal Parganas of Courts appointed under the Bengal United Provinces and Assam Civil Courts Act, 1887, or its predecessor, the Bengal Civil Courts Act, 1871. It remains to see what suits are put within the cognizance of these Courts. By Section 9 the jurisdiction of a Judge of one of these Courts extends to—

"Suits of which the value exceeds Rs. 1,000 and which are not excluded from his cognizance by the Sonthal Parganas Settlement Regulation or by any other law for the time being in force."

Their Lordships are clearly of opinion that these words of exclusion refer to Section 5 of the Regulation of 1872, which excluded from the cognizance of any such Court suits relating to land, the settlement of which had not been finished and duly notified, and placed them exclusively in the hands of settlement officer or officers appointed by the Lieutenant-Governor of Bengal under Section 2 of the Regulation of 1855. This exclusive jurisdiction is therefore maintained, and

the rights of the daughters' sons in reference to a subsequent contingent event which had now happened in the death of Premmoni leaving sons and that the testator's intention was that the sons of a daughter were to take her share on her death; but that though the gifts to Premmoni's sons as a class was not void on the ground that those of such sons as were born after the testator's death could not take under the rule of Hindu law that no person not in existence at the time of the testator's death can take under his will, yet in view of that rule of Hindu law and Section 3 of the Hindu Wills Act only those sons of Premmoni who were born during the testator's life-time would take Premmoni's share. Ranimoni and Jugal Kishore, her adopted son appealed to the Privy Council.

Robert Finlay and Brown—for Appellants.

DeGruyther, A. M. Dunne Ross, and G. C. O'Gorman—for Respondents.

Lord Moulton:—Their Lordships have had an opportunity of considering the judgment of the Court below on the question as to whether on the death of the younger daughter leaving male issue the estate passed over for life to the elder daughter and they are of opinion that it is correct, and it is based on correct reasons. They will therefore humbly advise His Majesty to dismiss this appeal.

With regard to the contention of the appellants that the Court was wrong in holding that no grandchildren of the testator born, or adopted, after the death of the testator on 30th October, 1875, could take under his will, their Lordships will not advise His Majesty to make any order except that the present advice is not to prejudice the position of the second appellant if and when such question comes before a Court for decision.

The costs of all parties as between solicitor and client will come out of the estate.

S. A. R.

Appeal dismissed.

Solicitors for Appellants—T. L. Wilson and Co.

Solicitors for Respondents—(1) Watkins and Hunter and (2) Gush, Phillips, Walters and Williams.

***A. I. R. 1914 Privy Council**
(FROM CALCUTTA)

5th November, 1914.

LORDS SHAW, PARKER OF WADDINGTON
AND SUMNER, SIR JOHN EDGE AND
MR. AMEER ALI.

Munna Lal Parruck and others—Appellants

v.

Sarat Chunder Mukerji and another—Respondents.

On appeal from the High Court at Calcutta.

* * *Lim. Act, Art. 183—Mortgagedecree by High Court, Original Side, under T. P. Act, S. 88—Application for order for sale under decree—Art. 183 applies.*

On 16-12-'86 appellant obtained a decree on a mortgage. On 3-7-1909 he applied for leave to add one U. L. Bose as party defendant and to sell, pursuant to his decree, certain properties. U. L. Bose opposed the application. The High Court on its original side decided in favour of U. L. Bose. The matter came before the High Court on appeal. The High Court decided as follows:—

1. It is for the Court in each case whether or not it will make an order under Order 41, Rule 20 and under the circumstance of the present case, U. L. Bose should be added as a respondent although the time for appealing had elapsed.

2. From the terms of the decree, it was peculiar and encouraged the contention that it was not within the provisions of the Transfer of Property Act. But for the purpose of the judgment it would be assumed that the decree was within the Transfer of Property Act.

3. If it was, as the appellant contended, a decree under Section 88 of the Transfer of Property Act no further decree was necessary. All that was required was under Section 89 an order for sale.

4. As regards the nature of an order for sale, it appeared to the Privy Council in 28 C. 557 that an application for an order for sale was a petition for realisation by the mortgagee of his decree. Article 183 therefore applied to the case and the application was out of time. 37 C 796 was referred to and explained.

On appeal to the P. C.

Held, that the decisions of the lower Court should be maintained.

FACTS:—The appellant was a mortgagee, and the mortgage under which he claimed was dated the 25th January, 1886. On the 16th of December, 1886, he obtained a decree on his mortgage by consent. On the 3rd of July, 1909, he made the application out of which the present appeal arose; and, by that application, he asked that he might be at liberty to add Upendra Lal Bose as a party defendant to

the suit, and that thereafter he might be at liberty to proceed to sell, pursuant to the decree made in this suit on the 16th December, 1886, an undivided quarter share of the defendant Sarat Chandra Mukerjee of, and in premises No. 30 formerly No. 49, Clive Street, Calcutta, and Nos. 1, 2 and 3 Bishoo Babu's Lane, Kidderpore, and the family dwelling-house at Kidderpore, and that for the purpose of such sale all necessary directions might be given to the Registrar. Mr. U. L. Bose's position was that on the 1st December, 1903, he became a purchaser of the Clive Street property, and in this affidavit he stated that "he was a *bona fide* purchaser for full market value, that he had no notice of the plaintiff's claim, that he had laid out large sums of money with borrowed funds in the improvement of the property, and that other persons besides himself had got an interest therein, and that it would be extremely hard if after the lapse of 23 years the plaintiff was allowed to assert a claim which he had given up years ago."

The case was heard by Mr. Justice Fletcher, the parties before him being the applicant, the mortgagee, on the one side, and on the other the mortgagor and Mr. U. L. Bose who resisted the application with success. From the adverse judgment of Mr. Justice Fletcher an appeal was preferred to the High Court on its appellate side, and in that appeal the judgment of Jenkins, C. J. with which Woodroffe, J. agreed proceeded as follows, after narrating the facts of the case:— I will, at the outset, deal with a point taken on behalf of Mr. U. L. Bose. His name does not appear as a respondent, and therefore, it is maintained, as against him the judgment of Mr. Justice Fletcher cannot be touched. But it appears that the appellant made every effort, he could, to make Mr. U. L. Bose a party respondent. He may not have proceeded in the most approved manner, still undoubtedly he was anxious to have Mr. U. L. Bose as a respondent. Having failed in his endeavour, because he could not persuade the Court Officers to grant the necessary process, he has applied under Order XLI, Rule 21, that Mr. U. L. Bose may be added as a respondent here. It has been suggested that the Court has not power to do that, inasmuch as the time for appealing has elapsed;

but it is for the Court in its discretion to determine in each case whether or not it will make an order under Order XLI, Rule 20. I have indicated the circumstances under which it became necessary to make the application in this case, and I think that the appellant is entitled to ask that Mr. U. L. Bose should be made a party, and that there should be an order to that effect. Therefore, I propose to deal with this appeal on the footing of Mr. U. L. Bose being a respondent before us.

It is to be noticed that the decree on the mortgage was made so far back as the 16th December, 1886, and that the present application was made in 1909. Those dates have naturally prompted the respondents to raise a plea of limitation. The question that we have to decide is whether the applicant is right when he contends that he is, so far as this application goes, free from the law of limitation.

Now, the decree first provides for personal payment by the mortgagor and this is followed by a provision for the return of documents and so forth, on payment in accordance with this personal decree. Then there is a provision that in default of payment there is to be a sale of the property, and it is further ordered that if the money realised by such sale shall not be sufficient for the payment in full of the sum of Rs. 25,382-8-0 with interest, that being the amount for which the personal decree was passed, then the defendant should pay to the plaintiff the amount of the deficiency together with the plaintiff's costs. The decree is in a sense peculiar, and that has led to a contention before us on the part of the respondents that it does not come within the provisions of the Transfer of Property Act in general or of Sections 88 and 89 in particular. No doubt, if those sections be read literally, that is so. On the other side, it is contended that the decree comes within the provisions of the Transfer of Property Act, and it is on that ground principally that it is contended in the light of the cases that the present application is not barred.

For the purpose of my judgment, I will assume that this decree is within the Transfer of Property Act, and I prefer to put it on that broad ground rather than to seek minute distinctions, though I can quite see that the decree does encourage

the distinctions which have been suggested.

Now, if it be a decree, as the appellant before us contends, under Section 88, of the Transfer of Property Act, then no further decree was requisite. All that was required was, under Section 89, an order for sale. It is no use our looking into expressions in the cases, for the purpose of determining this; the Act itself is clear and plain. It is provided in Section 88 that there shall be a decree for sale. Section 89 provides that if the payment contemplated by the decree, is not made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in Section 88, and thereupon the defendant's rights to redeem, and the security, shall both be extinguished. Now, what is the nature of an order for sale? In *Harendra Lal Roy Chowdhri v. Mahavani Dasi* (1) there was a decree for sale, substantially as here, and the respondents in that case, the mortgagors, being in default, the appellants petitioned for an absolute order for sale. Lord Davey in disposing of the case, says in the course of his judgment, "under the circumstances, it is not surprising that the respondents were not able to find the money on the stipulated day; and thereupon the present appellant presented a *petition for realization of his entire decree by sale of the mortgaged properties*." He goes on to say, in describing what had been done by the learned Subordinate Judge who acceded to the application:—"The learned Subordinate Judge in the first instance gave the appellant execution for the whole amount of his decree." So it appeared to the Privy Council in that case, that an application for an order for sale was a petition for realization by the mortgagee of his decree.

Now, this case falls within the provisions either of Article 183 or Article 181 of the Limitation Act; it does not fall within the provisions of Article 182. Article 183 deals with an application "to enforce a judgment, decree or order of any Court established by Royal Charter

in the exercise of its ordinary original civil jurisdiction or an order of His Majesty in Council," and provides a period of twelve years from when "a present right to enforce the judgment decree or order accrues to some person capable of realising the right." If this case comes within Article 183, it is free from the embarrassment of the conflicting decisions under Article 182. If, and so far as this can be regarded, in the words of Lord Davey as "an application for realisation of a decree", it is not unfair to say that it is an application *to enforce a judgment*, as being either a proceeding in execution or a proceeding for judicial relief under a decree. I therefore see no reason why Article 183 should not apply. If that be so, then it follows that this application is out of time.

I do not propose to make more than a passing reference to the argument that has been addressed to us in relation to Article 181.

There have been brought to our notice numerous cases on Article 181 and Article 182 or more strictly speaking on Articles 178 and 179 of the former Limitation Act, with a view to showing that these Articles did not apply in the past to an application under Section 89 of the Transfer of Property Act, and that by parity of reasoning they could not govern applications under the substituted provisions of Order XXXIV of the Code of Civil Procedure. One object in view when the present Code was passed was to end, as far as possible, the conflict of decisions which embarrassed the Courts, and among those conflicting decisions were those which dealt with two points:—*First*, whether an application for an order under Section 89 of the Transfer of Property Act was an application in execution or not; and, *secondly*, whether, if it was not an application in execution Article 181 constituted a bar on the ground that the application was one not contemplated by the Code of Civil Procedure. And so it is now provided that the application which follows a preliminary decree for sale, is not for an order for sale, but for a decree for sale. And with the same end in view the provisions as to mortgage-suits have been removed from the Transfer of Property Act to the Civil Procedure Code, so that it is no longer possible to contend

(1) [1901] 1.L.R. 28 Cal. 557 = 28 I.A. 89, 97.

that these applications are not under the provisions of the Civil Procedure Code. I am aware that there is an opinion expressed in *Madhab Mani Dasi v. Lambert* (2) which it may be difficult to reconcile with this, but it is not a decision for as I read the judgment in that case the learned Judge expressly refrained from deciding the point which was a necessary preliminary to its becoming a point calling for actual decision. It could only have been a point for decision if it had been decided that the new Code applied. But the learned Judges not only expressly refrained from deciding this, but in effect negatived the view that the case fell under the new Code, for in conformity with the terms of the application out of which the appeal arose they determined that there should be an *order* absolute and not a final *decree* for foreclosure.

The result is that, for the reason which I have indicated in the earlier part of my judgment, I think Mr. Justice Fletcher rightly decided that the present application was barred, and that, therefore, this appeal should be dismissed with costs: Mr. U. L. Bose is entitled to a separate set of costs. From this judgment the present appeal to the Privy Council was preferred.

Attorney for the Appellant :—B. Sri-
mani.

Attorney for the Respondent :—U. L.
Bose.

DeGruyther and *R. Macklin*—for Res-
pondents.

Lord Shaw :—Their Lordships see no reason for interfering with the decisions of the Courts below, and they will humbly advise His Majesty to dismiss the appeal with costs.

S. A. R. *Appeal dismissed.*

Solicitor for Appellants :—G. C. Farr.

Solicitors for Respondents :—Richards,
Fox & Co.

(2) [1810] 37 Cal. 796=15 C. W. N. 337.

**** A. I. R. 1914 Privy Council.**
(FROM OUDH.)

10th December, 1914.

LORD SHAW, SIR JOHN EDGE AND

MR. AMEER ALI.

Sheo Narain Singh and others—Plaintiffs-
Appellants

v.

Bishunath Singh and another—Defend-
ants-Respondents.

1914 K—20

**** (a) Civil P.C., O. 8. R. 6—Suit for accounts of joint family money-lending business—Defendants entitled to receive certain sum from plaintiff—Doctrine of equitable set off was applied.**

A suit was brought by the plaintiff against the defendants for an account of joint money-lending business and other reliefs. Defendants were entitled to receive from the plaintiffs a certain sum. [P. 153, C. 2.]

Held, that having regard to the circumstances of the case which however, were not referred to in the judgment in any detail, the Court would be justified in applying the principle of equitable set off to the defendants' claim [P. 155, C. 1.]

(b) Arbitration—Award—Construction—Parties stating to arbitrator that no co-sharer is entitled to demand accounts from another—Award precludes parties from claiming accounts from one another for moneys realised prior to award—Deed, construction.

An Award stated *inter alia* :—

Each of the three parties..... stated that after the execution of the agreement all the three brothers have divided among themselves all the moveables consisting of cash and kind, ornamentsthat therefore there is no necessity for filing list thereof or giving any decision thereon; that they have understood the accounts among themselves and that no co-sharer has any right to demand accounts from another.

Held, the word "cash" in the passage quoted refers to all monies received by the parties before the statement was made to the arbitrator, and in any event the stipulation in the award that "now no co-sharer has any right to demand accounts from another" covers and excludes any claim for an account of such monies. [P. 154, C. 2.]

De Gruyther and *B. Dube*—for Appel-
lants.

E. Richards and *Grey*—for Respondents.

Mr. Ameer Ali :—This is an appeal from a judgment and Decree of the Court of the Judicial Commissioner of Oudh, dated the 26th of July, 1909, and arises out of a suit brought by the plaintiffs-appellants in the Court of the Subordinate Judge of Rae Bareilly against the defend-
ants-respondents for an account of the joint money-lending business and other reliefs. Although a number of questions appear to have been discussed in the Courts in India the only two argued on this appeal depend on the construction of certain provisions of an award made on the 5th August, 1895, which admittedly put an end to the joint status of the family, and on the applicability of the principle of equitable set-off to the facts of this case in so far as one of the points for determination is concerned.

The plaintiffs are the sons of one Gur Baksh Singh, who with his brothers, the defendants-respondents, formed a joint

Hindu family. On his death disputes appear to have arisen between the nephews and uncles which were referred to the arbitration of one Syed Fida Husain, who made the award referred to above. It is a very able document and appears to deal with the subjects of dispute in concise and perspicuous form. After reciting that "in every way the executants gave the arbitrator complete power for decision, and engage themselves and their representatives to be bound by whatever decision would be passed by him," the document proceeds to state:—

"But on the 31st July, 1895, each of the three parties in his statement recorded by me stated that after the execution of the agreement all the three brothers have divided among themselves all the moveables consisting of cash and kind, ornaments, clothes, and household goods, and that therefore there is no necessity for filing list thereof or giving any decision thereon; that the sum of Rs. 3,150 on account of deficiency in the price of ornaments and Rs. 2,500 which is the personal money of Thakur. Raghunath Singh contributed to the joint business, total Rs. 5,650 is to be paid to him; that the manner in which this money is to be paid has to be decided; that they have understood the accounts among themselves and that now no co-sharer has any right to demand accounts from another; that only the grain kept for home consumption and the dealings with the tenants, the agricultural implements, cattle, horses, and elephants are still undivided."

The plaintiffs seek in the present suit for an account of the debts and monies realised by the defendants during their management of the joint money-lending, business, and in list C attached to the plaint they specify particularly the debts in respect of which the claim for account is directed. The important items in the list relate to a usufructuary mortgage, dated the 16th of June, 1883, executed by one Mohammed Askari in favour of Bishunath Singh as representing the joint family. The principal sum secured by the mortgage was Rs. 32,000; and it was provided that should the mortgagor fail to discharge the principal and interest within the period of 14 years, the term of the mortgage, the mortgage-debt would become discharged at the end of that period by the receipt of the usufruct. Under this covenant the first defendant was receiving the usufruct of the mortgaged property towards the liquidation of the principal and interest. At the time of the award two years were still outstanding in respect of this mortgage.

There is no reference to the award in the plaint, but the defendants contend that under the terms and intent of the award the plaintiffs are not entitled to the relief they seek. The first question for determination, therefore, is whether having regard to the declaration contained in the award the plaintiffs are not precluded from asking for an account of monies realised previous to the date of the award.

The Subordinate Judge dismissed the plaintiffs' claim in this respect on the ground that in his judgment it was barred by limitation. The Judicial Commissioner's proceeding on the award, have held that it seemed to them sufficiently clear from the provisions of the document that the arbitrator did not intend to confer on any one of the brothers the right to demand from the others an account of the profits enjoyed to the date of the award under Mohammad Askari's usufructuary mortgage. Their Lordships think that the conclusion at which the appellate Court in India has arrived is correct.

The word "cash" in the passage quoted clearly refers, in their opinion to all monies received by the parties before the statement was made to the arbitrator, and in any event, it appears to their Lordships that the stipulation in the award that "now no co-sharer has any right to demand accounts from another" covers this claim and excludes it.

The second question relates to a sum of Rs. 5,000 or thereabouts regarding which the defendants claim a set-off against the amount decreed in favour of the plaintiffs on other items.

The arbitrator had found that two sums of Rs. 5,650 and Rs. 1,000 respectively were payable to the defendant Bishunath and had declared that it should be "paid out of the joint income." And he added that he would specify later on "the joint income."

Similarly he had found that Rs. 5,150 was payable to Jadunath. Bishunath and Jadunath, each being liable to the other for a certain share of these debts, became entitled to receive from the plaintiffs, the sons of Gur Bakhsh, Rs. 5,900. Defendants contend that they are entitled to a set-off as regards this sum against the amount decreed to the plaintiff on account of "the joint income" of the parties. The Sub-

ordinate Judge refused to give effect to the defendants' contention, and his view was upheld at one stage of the case by the Court of the Judicial Commissioner. At a subsequent stage when the case came back to the appellate Court after the remand it had ordered for certain enquiries, the learned Judges who heard the appeal modified the view previously expressed, and considered that having regard to the circumstances of the case, the Court would be justified in applying the principle of equitable set-off to the defendants' claim. Their Lordships concur generally with the reasons given by the learned Judges for coming to this conclusion.

In the result their Lordships think that this appeal should be dismissed with costs and they will humbly advise His Majesty accordingly.

S. A. R. *Appeal dismissed.*

Solicitors for Appellants—Barrow, Rogers and Neville.

Solicitors for Respondents—T. L. Wilson and Co.

A. I. R. 1914 Privy Council. (FROM HONGKONG).

6th March, 1914.

LORDS CHANCELLOR, ATKINSON, SHAW,
MOULTON AND SUMNER.

Ibrahim—Appellant

v.

King-Emperor—Respondent.

(a) *Jurisdiction—Foreigner—Afghan subject of Amir of Afghanistan enlisted in British Indian Regiment—Supreme Court of Hong Kong has jurisdiction over him under Foreign Jurisdiction Act, 1890, S. 4, and China and Corea Orders in Council Arts. III, V, VI XIX, XXII, XXXV and L—Implied consent of Amir for jurisdiction being exercised over his subjects—Enlistment in army makes him a British protected person "and therefore subject to jurisdiction—Foreigner."*

Article III of the China and Corea Order in Council in defining a "British subject" includes a "British protected person" and by Clause (b) a person who by virtue of the Foreign Jurisdiction Act 1890 or otherwise enjoys His Majesty's protection in China or Corea." [P. 157, C. 2.]

Though there may be no evidence of a treaty or other instrument by which the Amir of Afghanistan agreed to His Majesty exercising authority over the Amir's subjects, yet it may be inferred that he consented in fact to the enlisting of native Afghans in native regiments, and its consequences, namely of bringing them *de facto* under the authority of His Majesty. [P. 157, C. 2.]

Quaere—Whether such enlisted Afghans come within the terms of Article V (4) of the Orders in Council as "foreigners with respect to whom any King whose subjects they are consents to the exercise of power or authority by His Majesty."

Section 4 (1) of the Foreign Jurisdiction Act of 1890 does not make the evidence of the Judge of a provincial Court inadmissible on the question of jurisdiction and in the absence of contradiction and real doubt, that evidence by itself satisfactorily proves the jurisdiction of the British Court. [P. 158, C. 1.]

The evidence may show that by usage, sufferance or other lawful "means", His Majesty has jurisdiction in fact extending to persons of the class to which the party in question belongs and was exercised generally and not objected to by the foreign authorities concerned, holding office *de facto*. [P. 158, C. 1.]

Even if there be a change in the form of Government of the foreign state wherein the British Court is situate and the Court could take judicial notice of a political change in the neighbouring state, the evidence may be sufficient to show that no change in the exercise of the jurisdiction and no diminution of the usage or the sufferance of it had occurred in consequence. [P. 158, C. 1.]

A soldier of the Crown, subject to military law, needs no express provision to entitle him to His Majesty's protection and in virtue thereof is subject also to British Courts. [P. 158, C. 2.]

The words "and not otherwise", in Article V (3) of the Order do not import that if a person is in fact a foreigner, he can only be brought under the jurisdiction "in the cases and according to the conditions specified therein." They are not words limiting other provisions by which a person is clearly brought within the jurisdiction. They mean that when a "foreigner," as such is to be brought within the jurisdiction, that can be done only in cases and according to the provisions specified; but when it is as "a British protected person" he is brought in, the fact that he is a foreigner is only accidental and the limitation contained in the words "and not otherwise does not apply." [P. 158, C. 2.]

(b) *Practice—Precedents—English Criminal Law and practice are applicable to proceedings in the Supreme Court of Hongkong under Art. XXXV (2) of the China and Corea Order in Council with such modifications as local circumstances may require.*

By Article XXXV (2) of the China and Corea Order in Council it is provided that "subject to the provisions of this order, criminal Jurisdiction under this order shall, as far as circumstances admit, be exercised on the principles of and in conformity with English law for the time being." English Criminal law and practice therefore apply to the Criminal jurisdiction of the supreme Court with such variations as are required by the necessities of the local order having regard to the principles of British Justice. [P. 159, C. 2.]

(c) *Evidence Act. S. 24—Confession—Admissibility—Statement made by accused to a person in authority is inadmissible in evidence unless proved to have been made voluntarily, without hope or fear—it is a rule of policy and the statement is looked on with suspicion*

but there is no presumption in law that it is untrue.

It is a positive rule of English Criminal law that no statement of an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, that is, not obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. [P. 160, C. 1.]

The rule excluding evidence of statements made by a prisoner when induced by hope held out or fear inspired by a person in authority is a rule of policy. The law does not presume such statements to be untrue but from the danger of receiving such evidence, Judges have thought fit to reject it for the due administration of Justice. *Rex v. Warwickshall* (1783) 1 Leach C. C. 263 = 2 East. P. C. 658. *Reg. v. Baldry* (1852) 2 Den. C. C. R. 430 = 21 L. J. M. C. 130 = 5 Cox. C. C. 523 = 16 Jur. 599 Referred to. [P. 160, C. 2.]

(d) *Evidence Act, S. 24—Statement by accused induced by hope or fear is relevant and therefore admissible—That fact affects its weight and not admissibility.*

The fact that a statement was made by an accused under circumstances of hope or fear logically affected the weight and not the admissibility of the evidence and when such objections were absent, the statement was long regularly admitted as relevant.

Authorities on the question of admissibility of confession reviewed.

- Rex v. Thornton* (1824) 1 Moo. C. C. 27.
- Rex v. Wild* (1835) 1 Moo. C. C. 452.
- Reg. v. Kerr* (1837) 8 Car and P. 176.
- Reg. v. Cheverton* (1862) 2 F. & F. 833.
- Reg. v. Reason* (1872) 12 Cox. C. C. 228.
- Reg. v. Fennell* (1880) 7 Q. B. D. 147 = 44 L. T. 687 = 29 W. R. 742 = 50 L. J. M. C. 126 = 14 Cox. C. C. 607 = 45 J. P. 666
- Reg. v. Brockembury* (1893) 17 Cox. C. C. 628.
- Reg. v. Petit* (1850) 4 Cox. C. C. 164.
- Reg. v. Berriman* (1854) 6 Cox. C. C. 388.
- Reg. v. Gavin* (1885) 16 Cox. C. C. 656.
- Reg. v. Male* (1843) 17 Cox. C. C. 689.
- Rex v. Goddard* (1896) 60 J. P. 491.
- Reg. v. Millar* (1895) 18 Cox. C. C. 54.
- Reg. v. Histed* (1898) 19 Cox. C. C. 16.
- Rogers v. Hawkin* (1898) 67 L. J. Q. B. 526 = 62 J. P. 279 = 58 L. T. 655 = 19 Cox. C. C. 122.
- Rex v. Best* (1909) 1 K. B. 692 = 78 L. J. K. B. 658 = 25 T. L. R. 280 = 10 L. T. 622.
- Rex v. Knight and Thayre* (1905) 20 Cox. C. C. 711 = 21 T. L. R. 320 = 69 J. P. 108.
- Rex v. Booth and Jones* (1910) 5 Cr. App. Rep. 177.
- Rex v. Wong Chin Kwai* (1908) 3 Hong Kong L. R. 89.

(e) *Privy Council—Ground of interference in Criminal matters—To justify interference the conduct of a Judge should be a "violation of the principles of natural justice and not exercise of his discretion which under the circumstances was not improper."*

If a Judge, after anxious consideration of the authorities, decides in accordance with "a probable opinion" of the present law, though it is not

actually the better opinion, such conduct is not "violation of the principles of natural justice" which has been said to be the ground for advising His Majesty's interference in criminal matters.

(f) *Privy Council—Criminal appeals—When leave is granted—Similarity to applications for special leave—Good grounds for allowing appeal alone are grounds for admission and vice versa—Evidence to be gone into by the Board in criminal matters to consider irregularities as affecting them.*

The practice of the Privy Council in Criminal matters has been repeatedly defined.

(1) Leave to appeal is not granted except where some clear departure from the requirements of justice exists.

Riel v. Queen (1885) 10 A. C. 675 = 54 L. T. 339 = 55 L. J. P. C. 28 = 16 Cox. C. C. 48.

Unless by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.

In re Dillet (1887) 12 A. C. 459 = 36 W. R. 81 = 56 L. T. 615 = 16 Cox. C. C. 241.

(2) The Board treats applications for special leave and the hearing of criminal appeals on the same footing.

Riel v. Queen (1885) 10 A. C. 675 = 54 L. T. 339 = 55 L. J. P. C. 28 = 16 Cox. C. C. 48.

Ex parte Deeming (1892) A. C. 422.

(3) The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself and conversely it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it.

Thus, mere misdirection or irregularity as such will not suffice. *Ex parte Maorea* (1893) A. C. 346 = 1 R. 375 = 17 Cox. C. C. 702 = 69 L. T. 734.

There must be something, which deprives the accused of the substance of a fair trial or diverts the administration of law into a course which may be drawn into an evil precedent.

Reg. v. Bertrand (1867) 16 L. T. N. S. 752 = 36 L. J. P. C. 51 = 10 Cox. C. C. 618 = 1 P. C. 520 = 4 Moore P. C. N. S. 460 = 16 W. R. 9.

(4) The jurisdiction which the Board exercises in appeals in criminal matters involves a general consideration of the evidence and of the circumstances of the case in order to correlate the irregularities complained of to the whole matter.

(g) *Privy Council—Objectionable evidence—Not affecting verdict of jury—Does not amount to miscarriage of justice.*

When the preponderance of unquestioned evidence is so great that it is highly improbable, if not impossible that the jury were substantially influenced by the objectionable evidence, the Board cannot conclude that there has been any miscarriage of justice, substantial, grave or otherwise.

Makin v. Attorney-General for New South Wales (1894) A. C. 57 = 6 R. 373 = 36 L. J. P. C. 41 = 17 Cox. C. C. 704 = 69 L. T. 778 = 58 J. P. 148—Considered and distinguished.

Rex v. Dyson (1908) 2 K. B. 454 = 99 L. T. 201 = 77 L. J. K. B. 813—Referred to.

A. Romer Macklin—for Appellant.

Robert Finlay and Hunsell—for Crown.

Lord Sumner:—The Appellant, Ibrahim, is a natural-born subject of the Ameer of Afghanistan, who was duly enlisted and enrolled on 12th January, 1911, in the 126th Regiment of Baluchistan Infantry at Quetta. He took the oath of allegiance to His Majesty and made a solemn declaration undertaking among other things to go wherever ordered by land or sea. On 4th September, 1912, he was a private serving with the detachment of that regiment which was encamped on Shamien or Shameen Island at Canton as guard of the Concession. On Shameen are situated the various European Settlements including the British. About 10-30 p. m. *Subadar* Ali Shafa, a native officer in the same regiment, was murdered. Ibrahim was charged with the crime, tried before the Supreme Court of Hong Kong, and convicted. He was sentenced to death, but sentence was respited pending the hearing of this appeal, which is brought by special leave *in forma pauperis*. His grounds are two: *first*, that the jurisdiction of the Court was not established, and, *second*, that there was a grave miscarriage of Justice by reason of the misreception of evidence.

The jurisdiction of the Supreme Court of China and Corea is conferred by the Foreign Jurisdiction Act, 1890, and by the China and Corea Order in Council, 1904, and includes criminal jurisdiction. Article V provides that: "the jurisdiction conferred by this order extends to the persons and matters following, in so far as by Treaty, grant, usage, sufferance or other lawful means, His Majesty has jurisdiction in relation to such matters and things, that is to say:

"(1) British subjects, as herein defined, within the limits of this order"

"(3) foreigners, in the cases and according to the conditions specified in this order and not otherwise ;

"(4) foreigners, with respect to whom any State, King, Chief or Government whose subjects or under whose protection they are, has, by any treaty as herein defined or otherwise, agreed with His Majesty for, or consents to the exercise of power or authority by His Majesty."

By Article VI it is provided that

all His Majesty's jurisdiction, exerciseable in China or Corea for the hearing or determination of criminal or civil matters shall be exercised under

and' according to the provisions of this Order-in-Council and not otherwise."

The contention, therefore, is that the jurisdiction of the Supreme Court, conferred by and only exerciseable in accordance with the Order-in-Council, was not shown to extend, and therefore for the purpose of this case, did not extend to Ibrahim, who is admittedly an Afghan and a subject of the Ameer.

Article III of the Order defines a "British subject" thus:

"British subject includes a British protected person, that is to say, a person, who either (a) is a native of any protectorate of His Majesty and is for the time being in China or Corea, or (b) by virtue of the Foreign Jurisdiction Act, 1890, or otherwise enjoys His Majesty's protection in China or Corea."

There was no evidence of any treaty or other instrument by which the Ameer had agreed with the Crown for the exercise by His Majesty of power or authority over his subjects; but it may be reasonably inferred from the practice of enlisting native Afghans in Indian native regiments, whereby they are *de facto* brought under the authority of His Majesty, a practice which is matter of public knowledge, that the Ameer does in fact consent to such enlistment with its consequences. Whether or not this suffices to bring such enlisted Afghans within the terms of Article V. (4) of the Order-in-Council, "foreigners, with respect to whom any State, King, Chief or Government whose subjects...they are... consents to the exercise of power or authority by His Majesty," it is not necessary for their Lordships now to determine.

The British Vice-Consul, who in September, 1912 was also Acting Consul at Canton, is Judge of a Provincial Court, held at Canton under Article XIX of the Order, which is a Court of Record, and by Article XXII exercises "all His Majesty's jurisdiction, civil and criminal, not under this Order vested exclusively in the Supreme Court." He was called as a witness at Ibrahim's trial and deposed that the place of the murder was entirely within his jurisdiction; that the jurisdiction exercised at Canton on Shameen is the same extraterritorial jurisdiction as is exercised throughout China by the Supreme Court; that it is still in force; that "the Indian soldiers enjoy His Majesty's protection in Shameen, Canton, and the Court exer-

cises jurisdiction over them"; and that "consular protection extends to trying persons and protecting them if they are improperly arrested." This evidence was not modified under cross examination or contradicted in any way by evidence for the defence. The witness went on to say that he conducted the preliminary examination in this case and considered it expedient that the case should be sent for trial to Hong Kong (an opinion in which Major Barret, commanding the detachment, concurred), thus satisfying the provisions of Article L. of the Order with regard to the transfer of the case from Shameen to Hong Kong.

Their Lordships are of opinion that Section 4 (1) of the Foreign Jurisdiction Act, 1890, does not prevent this evidence from being admissible upon the question and that in the absence of contradiction and of any grounds for real doubt, His evidence by itself satisfied all the conditions of proof requisite to establish the jurisdiction of the Supreme Court at Hong Kong. It shows that, by usage, sufferance or other lawful "means", His Majesty has jurisdiction at Canton; that it in fact extends to persons of the class to which Ibrahim belongs; that in the case of Ibrahim himself it was exercised, so far as the preliminary examination went; and that its exercise, both generally and in this particular case, was suffered by the Chinese authorities holding office *de facto*, and that they made no objection. Incidentally it disposes of a point taken in argument, that whatever jurisdiction may have been ceded, agreed or suffered by the Imperial Government of China, it could not be deemed to persist by sufferance or otherwise since recent changes in the constitution and form of Government of China took place. Even if such change had been proved, as it was not, or even if the Court could under the circumstances in any way take judicial notice of a political change in a neighbouring State, this evidence was sufficient to show that no change in the exercise of the jurisdiction and no diminution of the usage or the sufferance of it had occurred. It was suggested that the Vice-Consul was not testifying to the exercise of jurisdiction and sufferance thereof in fact, but was only expressing his opinion that jurisdiction ought to extend to such a case as Ibrahim's, which he said was the first

case committed to the Supreme Court from Canton. The judges of the Supreme Court, on the hearing of the points reserved to the Full Court, did not so take it, neither do their Lordships, and were it not for the gravity and importance of the case they would not think it necessary to pursue this question of jurisdiction further.

Was Ibrahim a British-protected person because, "by virtue of the Foreign Jurisdiction Act, or otherwise he enjoys His Majesty's protection in China?" The words "or otherwise" must at least include the operation of other statutes, Imperial or Indian, applicable to the person in question, and the various legislative provisions referred to in the elaborate and valuable judgments in the Court below amply establish that, after enrolment and during service in the Indian army, Ibrahim was a soldier of the Crown and subject to military law while stationed at Shameen. That being so, their Lordships think that it needs no express provision to entitle him to His Majesty's protection. When the Crown lawfully enlists in its forces aliens along with British subjects and requires of them the same service, loyalty and allegiance as are the duties of British enlisted subjects, it extends to them the same protection in a foreign country, where all are serving together in the armed forces of His Majesty. Their Lordships are clearly of opinion that Ibrahim as of right "enjoyed His Majesty's protection" in China, and in virtue thereof was subject also to the jurisdiction of the Supreme Court of China.

Lastly, under this head reliance was placed on the words "and not otherwise" in Article V (5) of the Order. These words do not import that, if a person is in fact a foreigner, he can only be brought under the jurisdiction set forth in the Order "in the cases and according to the conditions specified therein." They are not words limiting other provisions by which a person is clearly brought within the jurisdiction. They mean that when a "foreigner," as such, is to be brought within the jurisdiction, he can be so dealt with only in the cases and according to the provisions specified, but when a person is brought under the jurisdiction as "a British protected person," and the fact that he is a foreigner is only accidental, the limitation

contained in the words "and not otherwise" in Article V (3), does not apply.

Their Lordships think it unnecessary further to pursue the points argued as to the necessity for proof of the Treaty of Tientsin, 1858; the validity of the proof of the Indian Army Act, 1911 (which, for reasons hereinafter appearing, is so formal a matter as to be immaterial on the present appeal); the conditions under which the Crown may enlist aliens in its Indian forces; and the effect of the preamble and recitals in the China and Corea Order in Council, 1904.

The second ground for this appeal is as follows:—Some 10 or 15 minutes after *Subadar* Ali Shafa was shot Major Barrett, the officer commanding the detachment, who had been summoned from a little distance, arrived at the camp. He found Ibrahim in custody and in bonds, sitting on the step of the guard-room. "When I got up to Ibrahim," says the Major, "I said, 'Why have you done such a senseless act?' I said nothing else. Did not threaten him in any way. I offered no inducement of any kind, nor did anybody else to my knowledge or in my presence.....when I spoke to accused I was sorry for him because he had killed the *Subadar*." This last observation their Lordships treat only as evidence of the way in which the question was put, tending to show that it did not convey a command or inducement to Ibrahim of any kind. In truth, except that Major Barrett's words were formally a question they appear to have been indistinguishable from an exclamation of dismay on the part of a humane officer, alike concerned for the position of the accused, the fate of the deceased, and the credit of the regiment and the service. To this Ibrahim replied in Hindustani, "Some three or four days he has been abusing me; without a doubt I killed him."

It is argued that Ibrahim's statement was inadmissible, (a) as not being a voluntary statement but obtained by pressure of authority and fear of consequences; and (b) in any case as being the answer of a man in custody to a question put by a person having authority over him as his commanding officer and having custody of him through the subordinates who had made him prisoner.

On this it becomes incumbent on their Lordships to consider the rule of English

criminal law applicable to such circumstances. This somewhat exceptional duty arises because, by Article XXXV (2) of the China and Corea Order in Council, it is provided that "subject to the provisions of this order criminal jurisdiction under this order shall, as far as circumstances admit, be exercised on the principles of and in conformity with English law for the time being." There are no provisions in the order material on this point as modifying or excluding the principles and practice of English law, and their Lordships think that the matter may be justly treated as if English criminal law and practice applied to the criminal jurisdiction of the Supreme Court at Hong Kong. At the same time they are not to be understood to decide, that such law and practice are in all respects and particulars binding on that Court, nor do they overlook in any way the necessary distinction that must, sometimes be drawn between the criminal procedure of a European country, whose jurisprudence has a defined history extending over many centuries, and that applicable to a British possession in the Far East, where a mixed and fluctuating population is subject to the administration of the law by European Judges, whose duty it is to have regard alike to the principles of British justice, and to the necessities of local order. Nor do their Lordships fail to observe that the words, "so far as circumstances admit" may well be applicable to such circumstances in the present case as the facts, that the facilities for formal proof of statutes passed and administrative orders made in various parts of His Majesty's dominions cannot be as copious in Hong Kong as they are in this country, and further that when, as in the present case, a force detailed for the protection of Europeans resident beyond His Majesty's dominions in the midst of a population, often turbulent and at the particular time disturbed, is itself disturbed by such a crime as the murder of a *Subadar* by a native private in the ranks, such words may well cover and be designed to cover some necessary departure from the formalities only as distinguished from the essentials of English justice.

It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible

in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times. In *Reg. v. Thompson* (1), a case, which, it is important to observe, was considered by the Trial Judge before he admitted the evidence. There was, in the present case, Major Barrett's affirmative evidence that the prisoner was not subjected to the pressure of either fear or hope in the sense mentioned. There was no evidence to the contrary. With *Reg. v. Thompson* (1), before him, the learned Judge must be taken to have been satisfied with the prosecution's evidence that the prisoner's statement was not so induced either by hope or fear, and, as is laid down in the same case, the decision of this question, *albeit* one of fact, rests with the trial Judge. Their Lordships are clearly of opinion that the admission of this evidence was no breach of the aforesaid rule.

The appellant's objection was rested on the two bare facts that the statement was preceded by and made in answer to a question, and that the question was put by a person in authority and the answer given by a man in his custody. This ground, in so far as it is a ground at all, is a more modern one. With the growth of a police force of the modern type, the point has frequently arisen, whether, if a policeman questions a prisoner in his custody at all, the prisoner's answers are evidence against him, apart altogether from fear of prejudice or hope of advantage inspired by a person in authority.

It is to be observed that logically these objections all go to the weight and not to the admissibility of the evidence. What a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest or otherwise strictly goes only to its weight.

In an action of tort, evidence of this kind could not be excluded when tendered against a tortfeasor, though a jury might well be told as prudent men to think little of it. Even the rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out, or fear inspired by a person in authority, is a rule of policy. "A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it." *Rex. v. Warwickshall* (2). It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence Judges have thought it better to reject it for the due administration of justice. *Reg. v. Baldry* (3). Accordingly when hope or fear were not in question, such statements were long regularly admitted as relevant, though with some reluctance and subject to strong warnings as to their weight.

In the earlier part of the nineteenth century there was strong judicial authority for admitting a prisoner's statements, even though obtained by constables, who had him in custody, by considerable insistence in the way of interrogation *Reg. v. Thornton* (4); *Rex. v. Wild* (5) *Reg. v. Kerr* (6); and even so late as *Reg. v. Baldry* (3), a case decided on the rule as to hope and fear, Parke B. observes at p. 445.

"By the law of England, in order to render a confession admissible in evidence, it must be perfectly voluntary and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority vitiates a confession. The decisions to that effect have gone a long way: whether it would not have been better to have allowed the whole to go to the jury it is now too late to inquire, but I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame, when I consider what objections have prevailed to prevent the reception of confessions in evidence...justice and commonsense have too frequently been sacrificed at the shrine of mercy."

The law, however was considered to be fairly settled (see *Reg. v. Cheverton* (7),

(1) [1893] 2 Q. B. 12=62 L. J. M. C. 93=69 L. T. 22=5 R. 392=17 Cox. C. C. 641=41 W. R. 525=57 J. P. 312.

(2) [1783] 1 Leach. C. C. 263=2 East. P. C. 658.

(3) [1852] 2 Den. C. C. R. 430=21 L. J. M. C. 130=5 Cox. C. C. 523=16 Jur. 599.

(4) [1824] 1 Moo. C. C. 27.

(5) [1835] 1 Moo. C. C. 452.

(6) [1837] 8 Car. & P. 176.

(7) [1862] 2 F. & F. 833.

and *Reg. v. Reason* (8), *Reg. v. Fennell* (9) and the references collected in the note to *Reg. v. Brackenbury* (10). When Judges excluded such evidence, it was rather explained by their observations on the duties of policemen than justified by their reliance on rules of law (e.g., *Reg. v. Pettit* (11), *Reg. v. Berriman* (12) a case when the accused was not yet in custody).

In 1885 *Reg. v. Gavin* (13) re-opened these questions. Then A.L. Smith J., excluded a statement made to a constable, who questioned his prisoner in a way that amounted to cross-examination. He laid it down that a constable has no right to ask questions without expressly saying that the answers cannot be relevant evidence. In 1893, Day, J., *Reg. v. Brackenbury* (10) declined to follow this decision, in a case when the question and answer preceded the arrest, and Cave, J., in *Reg. v. Male* (14), rejected a statement made by a prisoner in custody to a constable who had cross-examined him, saying merely that the police have no right to manufacture evidence, though in 1896, *Rex v. Goddard* (15), he appears to have concurred in the admissibility of very similar matter. Two years later, Hawkins, J., *Reg. v. Miller* (16), allowed the accused's answers to be proved against him when he had been cross-examined before arrest, saying that he did not expressly dissent from *Reg. v. Gavin* (13), but that "every case must be decided according to the whole of its circumstances," but in 1898 *Reg. v. Histed* (17), he excluded the answers of a prisoner in custody, on the authority of *Reg. v. Gavin* (13), saying that the constable was entrapping the prisoner and trying by a trick to set a broken-down case on its legs again. Since then the current of authority has run the other way. In *Rogers v. Hawken* (18), a case of questions

before arrest, a Divisional Court, consisting of Russell, L.C.J., and Mathew, J., Judges not prone to lean against a prisoner, held that the statement was admissible and observed that "*Reg. v. Male* (14) must not be taken as laying down that a statement of the accused to a police constable without threat or inducement is not admissible. There is no rule of law excluding statements made in such circumstances," and in *Rex v. Best* (19), the Court of Criminal Appeal (including Channell, J.) held that "it is quite impossible to say that the fact that a question of this kind has been asked invalidates the trial," adding that *Reg. v. Gavin* (13), is not a good decision. Here, however, it is to be observed that the actual decision was that under the proviso of Section 4 of the Criminal Appeal Act, 1907, the Court would not interfere in that case. It did not expressly declare that statements of an accused, when in custody, in reply to a policeman's questions, are always admissible evidence against him unless they are rendered involuntary by reason of hope or fear induced by a person in authority. The point has been before the Court of Criminal Appeal more recently. In 1905 *Reg. v. Knight and Thayre* (20), statements were rejected, because obtained from the accused before arrest by means of a long interrogation by a person in authority over him. Channell, J., adverted thus to the case of questions put by a constable after arresting—

"When he has taken anyone into custody..... he ought not to question the prisoner..... I am not aware of any distinct rule of evidence that, if such improper questions are asked, the answers to them are inadmissible, but there is clear authority for saying that the judge at the trial may in his discretion refuse to allow the answers to be given in evidence."

The same learned Judge in *Rex v. Booth and Jones* (21), in 1910 observes

"the moment you have decided to charge him and practically got him into custody, then, inasmuch as a Judge even cannot ask a question or a Magistrate, it is ridiculous to suppose that a policeman can. But there is no actual authority yet that if a policeman does ask a question it is inadmissible; what happens is that the Judge says it is not advisable to press the matter."

(8) [1871] 12 Cox. C. C. 228.

(9) [1880] 7 Q. B. D. 147=44 L. T. 687=29 W. R. 742=50 L. J. M. C. 126=14 Cox. C. C. 607=45 J. P. 666.

(10) [1893] 17 Cox. C. C. 628.

(11) [1850] 4 Cox. C. C. 164.

(12) [1854] 6 Cox. C. C. 388.

(13) [1885] 16 Cox. C. C. 656.

(14) [1893] 17 Cox. C. C. 689.

(15) [1896] 60 J. P. 491.

(16) [1895] 18 Cox. C. C. 54.

(17) [1898] 19 Cox. C. C. 16.

(18) [1898] 67 L. J. Q. B. 526=62 J. P. 279=58 L. T. 655=19 Cox. C. C. 122.

(19) [1909] 1 K. B. 692=78 L. J. K. B. 658=25 T. L. R. 280=100 L. T. 622.

(20) [1905] 20 Cox. C. C. 711=21 T. L. R. 310=69 J. P. 108.

(21) [1910] 5 Cr. App. Rep. 177.

and of this, Darling, J., delivering the judgment of the Court of Criminal Appeal, observes "the principle was put very clearly by Channell, J."

The learned Trial Judge in the present case, in addition to the argument of counsel for the defence, had before him a case decided in 1908 by the full Court at Hong Kong, *Rex v. Wong Chiu Kwai* (22), in which the English authorities up to that time were very fully examined. Before admitting the evidence of the appellant's statement he consulted Gompertz J., who had been a party to that decision, and accordingly it is clear that he admitted the statement only after the fullest consideration. The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials. Many Judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. This consideration does not arise in the present case. Others, less tender to the prisoner or more mindful of the balance of decided authority, would admit such statements, nor would the Court of Criminal Appeal quash the conviction there after obtained, if no substantial miscarriage of justice had occurred. If, then, a learned Judge, after anxious consideration of the authorities, decides in accordance with what is at any rate a "probable opinion" of the present law, if it is not actually the better opinion, it appears to their Lordships that his conduct is the very reverse of that "violation of the principles of natural justice" which has been said to be the ground for advising His Majesty's interference in a criminal matter. If, as appears even on the line of authorities which the Trial Judge did not follow, the matter is one for the Judge's discretion, depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case, their Lordships think, as will hereafter be seen, that in the circumstances of this case his discretion is not shown to have been exercised improperly.

Having regard to the particular position in which their Lordships stand to

criminal proceedings, they do not propose to intimate what they think the rule of English law ought to be, much as it is to be desired that the point should be settled by authority, so far as a general rule can be laid down where circumstances must so greatly vary. That must be left to a Court which exercises, as their Lordships do not, the revising functions of a general Court of Criminal Appeal. *Clifford v. King-Emperor* (23). Their Lordships' practice has been repeatedly defined. Leave to appeal is not granted "except where some clear departure from the requirements of justice" exists (*Riel v. Queen* (24)), nor unless "by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done." *In re Dillet* (25). It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing (*Riel's case* (24), *Deeming Ex parte* (26)). The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice *Macrea Ex parte* (27). There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future *Reg v. Bertrand* (28).

Their Lordships were strongly pressed in argument with the case of *Makin v.*

(23) (1913) 41 Cal. 568=22 I. C. 496=40 I. A. 241 (P.C.).

(24) (1885) 10 A.C. 675=54 L.T. 339=55 L.J. P.C. 28=16 Cox. C.C. 48.

(25) (1887) 12 A.C. 459=36 W.R. 81=56 L.T. 615=16 Cox. C.C. 241.

(26) (1892) A.C. 422.

(27) (1893) A.C. 346=1 R. 375=17 Cox. C. C. 702=69 L.T. 734.

(28) (1867) 16 L.T. (N.S.) 752=36 L.J.P.C. 51=10 Cox. C.C. 618=1 P.C. 520=4. Moore P.C. (N.S.) 460=16 W.R. 9.

Attorney-General for New South Wales (29) in which Lord Herschell, L. C., delivered an elaborate exposition of the principles on which a Court of Criminal Appeal should act. Although in that case these observations are technically *obiter dicta*, since the Board held that the evidence complained of at the trial had been rightly admitted, they are most weighty in themselves, and they have since been adopted by the Court of Criminal Appeal in *Rex v. Dyson* (30) though with some later qualification. In *Makin's case* (29) however, their Lordships had to determine the true construction of Section 423 of the New South Wales Act, 46 Vic No. 17, which in defining a strictly appellate jurisdiction in criminal matters, provided "that no conviction or judgment thereon shall be reversed, arrested or avoided in any case so stated, unless for some substantial wrong or other miscarriage of justice." It was held there that to transfer the decision of the guilt of the accused from a jury, acting on oral testimony, to an Appellate tribunal, possessing that testimony only in writing, cannot be said to involve no miscarriage of justice, and hence that a Court of Criminal appeal is not entitled to dismiss the appeal by retrying the case on shorthand-notes, or by holding that, if the Trial Judge had excluded the evidence, which he wrongly received, the verdict would probably have been the same. In other words such a proviso is not to be construed as investing a statutory Court of criminal review with the functions of the original Trial Judge and jury. This is a very different matter from the duty of this Board in advising His Majesty as to the exercise of his prerogative in relation to facts as they are made to appear to this Board by admissible material. Even in *Makin's case* (29) however, reservation was made of cases "Where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury," and this reservation is not to be taken as exhaustive. In England, where the Trial Judge has warned the jury not to act upon the objectionable

evidence, the Court of Criminal Appeal under the similar words of the Criminal Appeal Act, 1907, Section 4 may refuse to interfere, if it thinks that the jury, giving heed to that warning, would have returned the same verdict. *Rex v. Lucas* (31), *Rex v. Stoddart* (32), *Rex v. Norton* (33), *Rex v. Loates* (34), *Rex v. Wilson* (35), or where evidence has been admitted inadvertently or erroneously, which is inadmissible but of small importance. *Rex v. Westacott* (36), *Rex v. Mullins* (37) or most unlikely to have affected the verdict, *Rex v. Solomon* (38). Where the objectionable evidence has been left for the consideration of the jury without any warning to disregard it, the Court of Criminal Appeal quashes the conviction, if it thinks that the jury may have been influenced by it, even though without it there was evidence sufficient to warrant a conviction. *Rex v. Fisher* (39). The rule can hardly be considered to be settled, but at any rate it seems to go so far as to substitute highly improbable for "impossible" in Lord Herschell's reservation above quoted.

Their Lordships think that the jurisdiction, which they exercise in appeals in criminal matters, involves a general consideration of the evidence and of the circumstances of the case in order to place the irregularities complained of, if substantiated, in their proper relation to the whole matter. The facts of the present case must, therefore, be stated. They are briefly as follows:—

During the hot weather of 1912 the sepoy of the 126th Baluchistan Regiment at Shameen lived and slept a great deal in the open air.

The camp was near the Central Avenue, shaded by trees and lit by the electric light standards in the Avenue. On the night in question the native officers, including *Subadar Ali Shafa*, were sitting in

- (31) 1 Cr. App. Rep. 234.
- (32) (1909) 73 J. P. 348=25 T. L. R. 612=53 S. J. 578.
- (33) (1910) 2 K. B. 496=102 L. T. 926=79 L. J. K. B. 756=74 J. P. 375=26 T. L. R. 550=54 S. J. 602.
- (34) (1910) 5 Cr. App. Rep. 193.
- (35) (1911) 6 Cr. App. Rep. 207.
- (36) (1906) 1 Cr. App. Rep. 248.
- (37) (1910) 5 Cr. App. Rep. 13.
- (38) (1909) 2 Cr. App. Rep. 80.
- (39) (1910) 1 K. B. 149=102 L. T. 111=79 L. J. K. B. 187=26 T. L. R. 122=74 J. P. 104.

- (29) (1894) A.C. 57=6 R. 373=36 L.J.P.C. 41=17 Cox. C.C. 704=69 L.T. 778=58 J.P. 148.
- (30) (1908) 2 K.B. 454=99 L.T. 201=77 L.J.K.B. 813.

chairs near the road. Ibrahim and three other sepoys were not far off in a group playing cards. The time was about 10-30 P.M. The *Subadar* went up to them, accused them of gambling, searched them took away \$ 3-80 of Ibrahim's money and ordered them to be confined to the lines. He abused Ibrahim with offensive language, against which Ibrahim protested, and then returned to his chair. A little time afterwards the sentry saw a man going into the camp itself to the place where the men's rifles were kept, and gave an alarm. A shot was fired, and the *Subadar* after calling to the guard to turn out, and walking a few steps, fell dead, a bullet having passed through his body. Almost at once a man was seen a few paces from the sentry, standing behind a tree and pointing his rifle in the direction of the place where the native officers were sitting. This last significant fact was elicited by the jury themselves. He was immediately seized and proved to be Ibrahim. He had his own service rifle in his hand, identified by its number. Five rounds, enough to fill one clip, were missing from his bandolier. Four cartridges were in the magazine of his rifle, the bolt of which was open; one, empty and still hot, was found on the ground. The rifle was fouled from recent discharge. No one else with a rifle was seen outside the camp when Ibrahim was seized.

This story, which did not depend at any point on the evidence of one witness only, was amply corroborated in various ways. Beyond an indefinite suggestion that Ibrahim had been instigated to commit this crime, which came to nothing the only attack on the witnesses was founded on discrepancies between them in matters of detail, or on the suggestion that they had amplified their evidence between the first trial, when the jury disagreed, and the second. It appears to their Lordships that a clearer case there could hardly be, and that it would be the merest speculation to suppose that the jury was substantially influenced by the evidence of what Ibrahim said to Major Barrett. If not impossible, it is at any rate highly improbable, that this should have been so, and when the preponderance of unquestioned evidence is so great, their Lordships cannot in any view of the matter conclude that there has been any miscarriage of justice, substantial, grave

or otherwise. They will humbly advise His Majesty that the appeal should be dismissed.

T. A. R.

Appeal dismissed.

Solicitors for Appellant :—Langlois, Harding, Warren and Tate.

Solicitors for the Crown :—Sutton, Ommanney and Rendall.

A. I. R. 1914 Privy Council. (FROM CALCUTTA.)

24th February, 1914.

LORDS MOULTON, SUMNER AND PARMOOR,
SIR JOHN EDGE AND MR. AMEER ALI.

Sm. Manokarani Debi—Plaintiff-Appellant

v.

Haripada Mitter and others—Defendants-Respondents.

(a) *Admission—Relevancy—The relevancy of admission to be determined by reference to Evidence Act—Admission by parent in a previous suit is not binding on son—Suing as an actual reversioner—Hindu Law—Reversioner.*

Admission made by parents in a previous suit cannot be used against the sons where the latter are suing as reversioners to a Hindu widow's estate and so in no sense derives their interests from their parents who cannot be regarded as expressly or impliedly authorised by them to make the admission. [P. 165, C. 1.]

(b) *Laches—Delay in suit by reversioner—Suit in time—Delay explained—No prejudice to suit.*

Considerable delay in the institution of a suit for possession by a reversioner cannot prejudice the plaintiff's claim if the suit is in fact within time and the delay is satisfactorily explained. [P. 165, C. 2.]

FACTS :—The suit was for possession. Ram Bullab Bose, the owner of No. 26, Prinsep Street, Calcutta, died in 1857 and was succeeded by his only son Loke Nath, who died in 1866 while still a minor. Thereupon, Monmohini, Ram Bullab's widow succeeded to the property as heiress to her son Monmohini, on 21st December 1867 executed a deed by which she purported to convey the property to one Juggo Lall Dubey who died afterwards, leaving the defendant in the present suit his heiress-at-law. Monmohini died on 26th February 1896 and the property devolved on the plaintiffs as reversionary heirs of Loke Nath.

The defendant pleaded that the conveyance was for legal necessity and that the purchaser acted in good faith and used reasonable care.

The Trial Judge, Stephen, J., of the Calcutta High Court, decided in defendant's favour. On appeal the High Court reversed this decision. The following are the material portions of the judgment:—

Though oral evidence was adduced the learned Judge placed no reliance on it for he held that it gave "very little basis for the defendants' case that Monmohini sold this property for necessity," and he, therefore, directed his attention to the documentary evidence on which alone his conclusion rests. I accept the learned Judge's appreciation of the oral evidence, and I, therefore, will, as he did, consider whether the documentary evidence suffices to establish the defendants' case. What principally impressed the learned Judge was an affidavit made in a suit brought by one Chuna Mull against Monmohini which he admitted, notwithstanding the plaintiffs' objection, as an admission "regarding the parents as the guardians of the plaintiffs and so capable of making admissions against their interests on their behalf." But the relevancy of an admission must be determined by reference to the terms of the Evidence Act, and I can find nothing in that Act which supports the view of the learned Judge.

The present plaintiffs in no sense derive their interest in the subject-matter of the suit from their parents, nor can their parents be regarded as having been expressly or impliedly authorized by them to make the admission. I, therefore, hold that the affidavit is not admissible in evidence against the plaintiffs.

Then what else is there in the case on which to rest the defendants' claim? There is no proof of an entry in any family books of account, for none are produced. The absence of their books might, if unexplained, excite a certain amount of suspicion against the plaintiffs, but the suggestion made by Pulim Behary, one of the plaintiffs, in explanation of their disappearance evidently impressed Stephen, J., favourably and I see no reason for not accepting it.

In the conveyance to Juggoo Lal the existence of two debts is no doubt asserted, but the authorities show that this is not proof, and beyond this there is no other document on which reliance has been placed either by Stephen, J., or by Counsel before us.

Nor is the meagreness of the evidence adduced on her behalf the only difficulty in the defendant's way.

In 1857 Jadunath Mitter presented a petition to the Court for the grant to him of Letters of Administration to the estate and effects of Ram Bullab Bose during the minority of his cousin, Loke Nath, and in that petition it is alleged that Ram Bullab left company's paper belonging to him. But neither in this petition nor in the accounts filed by Jadunath Mitter as administrator is there any trace of this debt.

Then again the petition for a certificate of guardianship to her son Loke Nath presented by Monmohini in 1866 shows that Ram Bullab left property including two money-lending businesses, one in Calcutta and the other at Sanamoye, and this agrees with the evidence of the defendant's own witnesses, Kedar Nath Mozumdar and Anundo Chander Chatterjee, that Ram Bullab when he died was a man of some means.

Then the sale was after the death of Loke Nath, and more than ten years after the death of Ram Bullab and the purchase-money was only Rs. 2,500.

It is true that in the conveyance Monmohini is said to have been identified by her sons-in-law, but the suggestion on the part of the plaintiff is that it was the extravagance of one of them, Dwarka Nath that led to the sale, and it was elicited in the cross examination of Kedar Nath that he was very extravagant and was constantly going to Monmohini for money, and it is further shown that Dwarka Nath had something to do with the handling of the purchase money.

It is true that there has been considerable delay in the institution of this suit and this delay appears the greater because of the length of time that elapsed before the revision fell in. But it is not usual for a reversioner to sue during the lifetime of the widow and in fact this suit is within time. The delay that has occurred since the widow's death has been reasonably explained as attributable to the pendency of another suit and the lack of means to meet the expenses of the litigation.

The conclusion then to which I come is that the defendant has failed to prove the existence of legal necessity, nor has it been shown that the purchaser used

reasonable care to ascertain the existence of such legal necessity or acted in good faith. The appeal, therefore, should, in my opinion, be allowed and a decree passed that the defendant do put the plaintiff in possession of the property. There must also be a decree for *mesne* profits in accordance with Order XX, Rule 12, and form 23, in Schedule D, that is to say, an inquiry as to *mesne* profits for three years prior to the institution of the suit and also from the institution of the suit until delivery of possession or the expiration of three years from the date of the decree, whichever event first occurs. Defendant-respondent to pay plaintiff appellants' cost of suit and appeal. The costs of the inquiry will be reserved.

The present appeal to the Privy Council was then preferred.

Upjohn and *A. M. Dunne*—for Appellant.

DeGruyther and *B. Dube*—for Respondent.

Lord Moulton :—Their Lordships have had the case on behalf of the Appellant very fully and forcibly put before them, and their attention has been called to the judgment of the Judge at the trial, and to the judgment of the High Court in its appellate jurisdiction. They are of opinion that the latter judgment, from which this Appeal is brought, is a judgment based upon proper principles and upon a due appreciation of the evidence in the case, and they can see no reason for differing from it. They will therefore humbly advise His Majesty that the appeal ought to be dismissed, and the appellant must pay the costs.

T. A. R. *Appeal dismissed.*

Solicitors for Appellant—Watkins and Hunter.

Solicitors for Respondents—W. W. Box and Co.

A. I. R. 1914 Privy Council. (FROM CANADA).

22nd October, 1914.

VISCOUNT HALDANE L. C., LORD MOULTON LORD SUMNER, SIR CHARLES FITZPATRICK, AND SIR JOSHUA WILLIAMS.

Attorney-General for the Province of Alberta—Appellant.

v.

Attorney-General for the Dominion of Canada—Respondent.

Canadian Pacific Railway Company—Intervenants.

On Appeal from the Supreme Court of Canada.

(a) *Reference*—*Supreme Court Act*, S. 60—*Variations in questions referred under*—To be permitted cautiously when they cast light on amended provisions and not for hypothetical alterations.

Great care should be exercised in permitting questions referred to the supreme Court, more especially when they come up on appeal, unless the questions relate to matters in their nature severable and the answers given may cast light upon the effect of the deletion or alteration of parts of the provisions the validity of which is being considered. But counsel should not be permitted to vary questions by hypothetical limitations not to be found in the provisions themselves or in the questions relating to them.

[P. 168, C. 2.]

(b) *Ultra vires*—*Canada*—*Legislative powers of Dominion under British North America Act, 1867 (30 & 31 Vict. C. 3)* Ss. 91 (sub-S. (29) 92, sub-S. 10 (a) & (c) overlaps power of provincial legislature under *Alberta Railway Act (Stat. of Alberta 1907 C.8)*, S. 82, sub-S. 3—*Provincial Railways taking lands of Dominion Railway is ultra vires*—*Provision is made for application in suitable cases to Board of Railway Commissioners under Railway Act. (R. S. Can., 1906 C. 37) S. 8.*

By Section 91, sub-Section (29) and Section 92 10 (a) and (c) the provincial legislature has no power to effect by legislation the line or works of a Dominion Railway. (*Canadian Pacific Ry. Co. v. Corporation of the Parish of Notre Dame De Bouscourse* (1) and *Madden v. Nelson and Fort Shepherd Ry. Co.* (2) (applied))

[P. 168, C. 1.]

The *Albert Railway Act*, Section 82, sub-Sections 1 and 2, provides that a railway company authorised by that act, may subject to certain conditions, take possession of, use or occupy the lands belonging to any other railway company.

Section 7 of C. 15 of 1912 amended the *Albert Railway Act* of 1907, by adding sub-Section 3, to Section 82 purporting to extend and apply its provisions to lands of every railway company authorised otherwise than under the legislative authority of the province "in so far as the taking of such lands does not 'unreasonably' interfere with the construction and operation" of the railway whose lands are taken.

Held, (1) Section 7 of C. 15 of 1912 was *ultra vires* of the *Alberta Legislature* and would not become *intra vires* if the word 'unreasonably' were struck out of the section. [P. 168, C. 1.]

(2) The inconvenience caused by the exclusive right of the Parliament of Dominion to legislate as to the physical track and work of Dominion railway is remedied by the administrative provisions. By Section 8 of the *Railway Act* of the Dominion, provincial railways desiring to cross a Dominion railway have a *locus standi* to apply to the Board of Railway commissioners whose function is to permit and regulate such crossings under suitable circumstances and with proper precautions for the benefit of the public. [P. 169, C. 1 & 2.]

*R. B. Finlay, S. B. Woods (of the Canadian Bar) and Geoffrey Lawrence—*for Appellants.

*E. L. Newcombe (of the Canadian Bar) and Raymond Asquith—*for Respondents.

*E. Lafren—*the Intervenants.

Lord Moulton:—The present appeal relates to two questions which were referred by H. R. H. the Governor in Council for the hearing and consideration of the Supreme Court of Canada pursuant to Section 60 of the Supreme Court Act. These questions relate to the validity of Section 7 of Ch. 15 of the Acts of the Legislature of the Province of Alberta of 1912, instituted "an Act to amend the Railway Act."

Prior to the passing of the above Act, Section 82 of the Alberta Railway Act of 1907 stood in the following form:

"The company may take possession of, use or occupy any lands belonging to any other railway company, use and enjoy the whole or any portion of the right of way, tracks, terminals, stations, or station grounds of any other railway company, and have and exercise full right and powers to run and operate its trains over and upon any portion or portions of the railway of any other railway company, subject always to the approval of the Lieutenant-Governor in Council first obtained, or to any order or direction which the Lieutenant Governor in Council may make in regard to the exercise, enjoyment, or restriction of such powers or privileges."

Sub-Section (2) —

"Such approval may be given upon application and notice, and after hearing the Lieutenant-Governor-in Council may make such order, give such directions, and impose such conditions or duties upon either party as to the said Lieutenant Governor-in Council may appear just or desirable having due regard for the public, and all proper interests and all provisions of the law, at any time applicable to the taking of land and their valuation, and the compensation therefor and appeals from awards thereon shall apply to such lands, and in cases under this section where it becomes necessary for the company to obtain the approval of the Board of Railway Commissioners for Canada, it shall do so in addition to otherwise complying with this section."

By Section 7 of the amending Act of 1912 the following sub-section was added to Section 82 above referred to:—

Sub-Section (3) —

"The provisions of this section shall extend and apply to the lands of every railway company or person having authority to construct or operate a railway otherwise than under the legislative authority of the Province of Alberta in so far as the taking of such land does not unreasonably interfere with the construction and operation of the railway or railways constructed and operated or being constructed and operated by virtue of or under such other legislative authority."

The questions referred to the Supreme Court of Canada were as follows:—

(1) "Is Section 7 of Chapter 15 of the Acts of the Legislature of Alberta of 1912 instituted 'An Act to amend the Railway Act' *intra vires* of the Provincial Legislature in its application to railway companies authorized by the Parliament of Canada to construct or operate railways?"

(2) "If the said section be *ultra vires* of the Provincial Legislature in its application to such Dominion Railway Companies, would the section be *intra vires* if amended by striking out the word 'unreasonably'?"

At the hearing before the Supreme Court of Canada, it would seem that, by consent of counsel representing the Dominion Government and the Province of Alberta respectively, a third question was submitted to the Court for hearing and consideration. It was hypothetical in form and no answer was given to it by Supreme Court. Their Lordships do not consider that this question should be regarded as forming part of the questions referred to the Supreme Court by H.R.H. the Governor in Council, or that it is included in the present appeal. No attempt was made to argue it at the hearing, and their Lordships do not propose to take further notice of it.

By Section 92 (10) of the British North America Act, 1867, it is enacted as follows:—Section 92, "In each Province the Legislature may exclusively make laws in relation to matters coming within the class of subjects next hereinafter enumerated, that is to say:—

Sub-Section 10—

"Local works and undertakings other than such as are of the following classes:—

(a) Lines of steam or other Ships, Railways, Canals, Telegraphs and other works and undertakings connecting the Province with any other or others of the Province or extending beyond the limits of the Province.

(c) Such works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces."

By Section 91 (29) of the British North America Act, 1867, it is enacted as follows:—Section 91.....It is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

S. N. D. A. R. v. C. A. L. P.
V. 2011 High Court.

Sub-Section (29) "Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

It has never been doubted that these words refer to and include Railways such as are mentioned in 92 (10) (a) and (c) above quoted. Indeed the language seems to point to 92 (10) so expressly that the contention is frequently heard that it is intended to refer to it solely. It is not necessary to decide such points in the present case. It suffices to say that Railways such as are described in 92 (10) (a) and (c) come under the exclusive legislative authority of the Parliament of Canada. The Provincial Legislature therefore has no power to affect by legislation the line or works of such a Railway. If authority were required for so plain and evident a conclusion from these statutory provisions, it is to be found in the judgments of their Lordships in the cases of *Canadian Pacific Ry. Co. v Corporation of the Parish of Notre Dame de Bonsecours* (1) and *Madden v. Nelson and Fort Sheppard Ry. Co.* (2).

The provision of Section 82 of the Alberta Railway Act, 1907, do not in the opinion of their Lordships necessarily clash with these rights of legislation which thus exclusively belong to the Dominion Parliament, for it is possible to give to the words "Railway Company" the limited meaning of a company owning and operating a Railway situated entirely within the Province, and to that extent the legislation is *ultra vires*. But sub-Section 3, which was added by the Act of 1912 and the validity of which is under consideration, expressly extends Section 82 so as to make it apply to a Dominion Railway. With this addition the provisions of Section 82 of the Railway Act, 1907, of the Legislature of Alberta unquestionably constituted legislation as to the physical construction and use of the track and buildings of a Dominion Railway, and that of a serious and far-reaching character. Their Lordships have no hesitation therefore in pronouncing that sub-Section 3 is *ultra vires* of the Alberta Legislature.

They are further of opinion that it would not become *intra vires* if the word "unreasonably" were struck out of the

section. It would still be legislation as to the physical tracks and works of the Dominion Railway, and as such would be beyond the competence of the Provincial Legislature. These are matters as to which the exclusive right to legislate has been accorded to the Parliament of the Dominion, so that the Provincial Legislatures have no power of legislation as to them, and this holds good whether or not the legislation is such as might be considered by juries or judges to be reasonable.

It was no doubt due to the almost self-evident character of these propositions that at the hearing of the appeal before their Lordships but little attempt was made to support the validity of sub-Section 3 in its entirety. To judge by the reasons given by the learned Judges of the Supreme Court in their judgments it would seem that much the same course was adopted in the argument before the Supreme Court. The true aim of the discussion seemed rather to obtain the opinion of the Court and of their Lordships upon hypothetical variations of the section which would have the effect of limiting its application. Indeed, in the hearing before their Lordships' counsel for the appellants practically confined their argument to the single case of a provincial railway crossing the track of a Dominion Railway. Their Lordships are of opinion that great care should be exercised in permitting questions thus referred to the Supreme Court to be varied, more especially when those questions come up on appeal for decision by their Lordships. It may no doubt happen that the questions relate to matters which are in their nature severable, so that the answers given may cast light upon the effect of the deletion or alteration of parts of the provisions the validity of which is being considered. But their Lordships do not desire to give any countenance to the view that counsel may vary the questions by hypothetical limitations not to be found in the provisions themselves or in the questions that relate to them.

In the present instance, however, the case chosen by counsel for the appellants as the subject of their arguments has no doubt strong claims for separate consideration, inasmuch as it is doubtless the case which was mainly present to the

(1) [1899] A.C. 367.

(2) [1899] A.C. 626.

mind of the Provincial Legislature when considering sub-Section 3. It has reference to the circumstances under which exclusive power of Parliament to legislate as to Dominion Railways appears to operate most harshly on the freedom of action of the Province. It was urged with great force that if the Provinces had no power to authorize their railways to cross the tracks of Dominion Railways they might theoretically be placed in a position of great difficulty. Regarded in the abstract it might be possible for a tract of country situated in a province to be surrounded by Dominion Railways in such a way that unless crossings were permitted a provincial railway situated within the tract would be completely isolated and cut off from access to other portion of the province. But the difficulty is essentially administrative, and not one that could be cured by any decision as to constitutional rights. It is scarcely too much to say that it would not be practicable to frame the actual claim of the province in the present case in such a way that it could be a constitutional right possessed by a province. Even their own counsel admitted that the province could not give to one of their Railways the right to cross a Dominion Railway at any place or in any specific way chosen by them. They admitted that the place and manner must be subject to the approval of the Railway Board, a body created by a Dominion Statute in the year 1903, whose powers depend on a Dominion Railway Act. How could a constitutional right be measured or defined by the views or decisions of such a body—one which did not exist when the constitution was created?

It is therefore not in abstract constitutional rights but in administrative provisions that the remedy must be sought for the inconveniences which in the abstract might flow from the fact that the exclusive power of legislating as to Dominion Railways is vested in Parliament. And in this respect the present form of the Dominion Railway legislation indicates and in their Lordships' opinion provides an effective remedy. By Section 8 of the Dominion Railway Act, Parliament treats in a special manner, the crossing of the Dominion Railways by Provincial Railways. These portions of the Provincial Railways are made subject to the clauses

of the Dominion Railway Legislation, which deals also with the crossing of two Dominion Railways, so that the Provincial Railways are in such matters treated administratively in precisely the same way as Dominion Railways themselves. The Parliament of the Dominion is entitled to legislate as to these crossings because they are upon the right of way and track of the Dominion Railway as to which the Dominion Parliament has exclusive rights of legislation, and moreover, as the Provincial Railways are there by permission and not of right, they can fairly be put under terms and regulations. But Section 8 of the Railway Act of the Dominion and the clauses which are by it made binding on any Provincial railway crossing a Dominion Railway appear to their Lordships to indicate that it is part of the functions of the Railway Board to permit and to regulate such crossings. They are left unfettered as to whether they will permit such crossing to be at any particular spot or to be carried out in any particular way, and this jurisdiction is essential to them as guardians of those powers of construction and operation of Dominion Railways which are necessary for their existence and efficiency. But these powers of permitting crossings by Provincial Railways under suitable circumstances and with proper precautions have not been given to them idly and for no purpose. They bring with them the duty of using those powers for the benefit of the public whenever an occasion arises where they can be wisely used.

By these provisions the Dominion Legislation has in their Lordships' opinion given to Provincial Railways desiring to cross a Dominion Railway all the *locus standi* which they need for making an application to the Railway Board for permission to do so. The Railway Board is bound to exercise these powers given to it just as much as all other powers given to it so as to advance the best interests of the public. In this way the legitimate claims of provincial railways to obtain facilities for crossing Dominion railways are in fact met as fully as is practicable, and this without risking the chaos of overlapping legislative powers.

Their Lordships are therefore of opinion that both the questions submitted to the Supreme Court of Canada should

be answered in the negative and that the decision appealed from was correct. They will accordingly humbly advise His Majesty that this appeal should be dismissed, but without costs.

T. A. R. *Appeal dismissed.*

Solicitors for Appellant—Blake and Redden.

Solicitors for Respondent—Charles Russell and Co.

Solicitors for Intervenants—Lawrence Jones and Co.

*** * A. I. R. 1914 Privy Council.**
(FROM CANADA.)

16th November, 1914.

LORDS MOULTON, PARKER OF
WADDINGTON AND SUMNER.

Mildred Howard—Appellant

v.

William Miller and another—Respondents.

On Appeal From The Supreme Court of Canada.

**** [Registration Act, S. 49]—British Columbia—Land Registry Act (Ch. 23 British Columbia Statutes 1906), Ss. 15, 24, 25, 29, 75, 92 and 116—Registration of titles to land in absolute fee is prima facie evidence of title which is rebutted by admission of the title of the true owner—Admissibility in evidence and value of unregistered conveyance—Nature and extent of a "charge" registered under the Act—No right of specific performance against true owner not a party to the agreement of sale—Counter-claim and Rectification of the Register.**

The respondents (the second respondent being a sub-purchaser) claim specific performance of an agreement to sell land entered into by a registered owner of "an absolute fee" under Section 15 of the Land Registry Act (Stat. of Brit. Co. 1906 C. 23), the agreement being entered as a "charge" upon the land under Section 25 of the Act. The appellant was entitled to the same land unless precluded by the Act, under an unregistered conveyance made by the vendor, the registered owner of the "absolute fee" before the registration of the "charge." The respondents claimed specific performance of the agreement against the vendor and the appellant and the appellant as the true owner counter-claimed for a declaration of her title and rectification of the register. At the trial, the unregistered conveyance was put in and evidence tendered of the admission of the title of the appellants by the vendor who did not defend the counter-claim—

Held, (1) The appellant not being a party to the agreement of sale, her rights as true owner could not be taken away. [P. 170, C. 2.]

(2) The admission of the appellants' title by the registered owner rebutted the presumption of the *prima facie* title of the vendor under Sections 15

and 24 of the Act, although the unregistered conveyance was inadmissible in evidence under Section 75. [P. 173, C. 1.]

(3) The respondents were in effect the purchasers of an interest commensurate with the relief which equity would give by way of specific performance of the agreement and the appellant were entitled to adduce the deed as a material circumstance for deciding the extent to which specific performance ought to be granted. [P. 173, C. 1.]

(4) Consequently, specific performance should be decreed against the vendor for conveying an interest which she had not and which she could not convey. [P. 173, C. 2.]

(5) The appellant was entitled to a declaration that notwithstanding the entry in the register, she is absolutely entitled to the land and the register should be rectified accordingly. [P. 173, C. 2.]

(b) *Specific performance—Against non-party cannot be granted.*

No specific performance can be decreed against person who was not a party to contract or who had not authorised the making of the contract on his behalf. [P. 170, C. 2.]

Owen Thompson and V. Laursen (of the Canadian Bar)—for Appellants.

E. P. Davis and M. M. Macnaghten—for Respondent.

Lord Parker:—In this case the plaintiffs claim specific performance of an agreement, dated 1st June, 1908, and made between the defendant Mary Jane Sheard of the one part and the plaintiff Miller of the other part, whereby the defendant Mary Jane Sheard contracted to sell, and the plaintiff Miller to purchase, some 4.14 acres of land in the Vancouver District in British Columbia. The plaintiff Nicholson is made a co-plaintiff as sub-purchaser of the property from the plaintiff Miller. The defendant Mildred Howard is joined as co-defendant on the ground that she claims an interest in the property adversely to her co-defendant. In their Lordships' opinion this joinder is misconceived and the judgment given at the trial, and confirmed on appeal, for specific performance against the defendant Mildred Howard and the vesting of her interest in a trustee for the plaintiffs is erroneous and cannot be sustained. There is no equitable principle by virtue of which land can be taken away from the true owner under colour of specific performance of a contract to which he was not a party and which he did not authorize to be made on his behalf. The action should have been dismissed with costs so far as the defendant Mildred Howard was concerned,

So far the case presents little difficulty, but there is a more important question which must be decided before this appeal is finally disposed of. Besides resisting the claim for specific performance as against her, the defendant Mildred Howard set up her own title to the property. She was, she said, entitled to it as heiress-at-law of the late Harry Howard, the former husband of the defendant Mary Jane Sheard, subject, nevertheless, to the dower interest of her mother, the last-named defendant, and she counter-claimed against the plaintiffs and her co-defendant for a declaration to that effect, with certain consequential relief. The defendant Mary Jane Sheard did not defend the counter-claim which against her must be taken as admitted. As against the plaintiffs, however, who did defend the counter-claim, the defendant Mildred Howard was put to the proof of her title. In order to prove it she put in three indentures. First, she put in an indenture dated 23rd August, 1893, whereby a certain block of land, of which the 4.14 acres in question formed part, was conveyed to Harry Howard and his wife, the defendant Mary Jane Sheard, in fee simple, as joint tenants. Secondly, she put in an indenture dated 14th June, 1905, whereby Harry Howard conveyed to his wife the defendant Mary Jane Sheard, an undivided moiety of the whole block in fee-simple, thus vesting the whole block in her. Thirdly, she put in an indenture also, dated 14th June, 1905, whereby the defendant Mary Jane Sheard conveyed to Harry Howard the entirety of the 4.14 acres in question. The two deeds of 14th June, 1905, in fact operated as a partition of the block between husband and wife.

The indentures above referred to, if admissible in evidence, are, in their Lordships' opinion, sufficient proof of the title set up by the defendant Mildred Howard, but the plaintiffs contend that the second indenture of 14th June, 1905, is not admissible in evidence against them, because of the provisions of Section 75 of the Land Registry Act (Chapter 23 of the Statutes of the Province of British Columbia, 1906), being an Act consolidating the existing statutes as to the registration of titles to land.

On reference to this statute it will be found that it contemplates and provides

for four registers. First, there is a Register of Indefeasible Fees. A certificate of title to an estate so registered is, as long as it remains uncanceled, conclusive evidence against all the world that the holder is entitled to the estate mentioned in the certificate (Sections 15, 16, and 81). Secondly there is a Register of Absolute Fees. The registered owner of an absolute fee is to be deemed to be the *prima facie* owner of the land referred to in the register for such an estate as he legally possessed therein subject only to such registered charges as appear existing thereon, and to the rights of the Crown (Sections 15 and 24). The certificate of title is not conclusive but only *prima facie* evidence of the title of the registered owner. It is to be observed that nothing less than a legal fee-simple can be registered as an absolute fee. Thirdly, there is a Register of Charges (Section 25), that is, according to the definition clause (Section 3), any less estate than an absolute fee, and any equitable interest in land, and any incumbrance Crown debt, judgment, mortgage, or claim to or upon any real estate. The registered owner of a charge is to be deemed to be *prima facie* entitled to the estate or interest in respect of which he is registered, subject only to such registered charges as appear existing thereon and to the rights of the Crown (Section 29). The certificate of title is not conclusive but only *prima facie* evidence of the title of the owner of a registered charge. It is to be observed that an applicant for the registration of a charge has in his application to state the nature of the charge in respect of which he requires registration (Form D in Schedule I to the Act,) and the register has also to state the nature of the registered charge (Form E, same schedule).

Lastly, there is, under Section 116, a register in which are entered copies of all instruments affecting land. Section 74 of the Act provides that no instrument executed after and taking effect after 30th June, 1905, and no instrument executed before 1st July, 1905, and taking effect after 30th June, 1905, purporting to transfer, charge, deal with, or affect land or any estate or interest therein (with an immaterial exception) shall pass any estate or interest, either at law or in equity, in such land, until the same shall

have been registered in compliance with the provision of the Act; and Section 75 provides that instruments executed before and taking effect before 1st July, 1905, transferring, charging, dealing with, or affecting land or any estate or interest therein, unless registered before the said date (with an immaterial exception), shall not be receivable by the Court or any Court of law or any registrar or examiner of titles as evidence or proof of the title of any person to such land as against the title of any person to the same land registered on or after 1st July, 1905, except in an action before the Court questioning the registered title to such land on the ground of fraud wherein the registered owner has participated or colluded. This section, in their Lordships' opinion, imposes a penalty on non-registration of an instrument by rendering such instrument inadmissible in evidence in certain cases, but has no further operation.

Returning to the facts of this case it appears that, after Harry Howard's death, the second deed of 14th June, 1905, came into possession of the defendant Mary Jane Sheard, and that on 30th July, 1907, she took both the deeds of 14th June, 1905, to the Land Registry Office in Vancouver for registration. What happened in the office is obscure, but, owing possibly to some misconception on the part of the registrar, the defendant Mary Jane Sheard ultimately signed an application prepared by him declaring she was owner of the land in question, and claiming to have it registered in her name in the Register of Absolute Fees, and obtained such registration; the second deed of 14th June, 1905, being absolutely ignored, though the registrar had possession of it and ought to have been aware of its effect. In this, if there was no fraud, there was evidently a serious miscarriage, and the plaintiff Miller in entering into the agreement of 1st June, 1908, to purchase the land in question was, undoubtedly, misled by the register and the certificate of title obtained by the defendant Mary Jane Sheard.

The agreement of 1st June, 1908, was, in their Lordships' opinion, an instrument purporting to affect land, and, therefore, required registration under Section 74 of the Act. When so registered (but not before) it would confer on the plaintiff

Miller an equitable interest his title to which would be registrable in the Registrar of Charges. On the day after the agreement was signed the plaintiff Miller lodged an application for the registration of his title to a charge by virtue of the agreement, but in such application he did not, as he ought to have done, state the nature of the interest in respect of which he claimed registration. It is material to consider what this interest really was. It is sometimes said that under a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase-money; but however useful such a statement may be as illustrating a general principle of equity, it is only true if and so far as a Court of Equity would under all the circumstances of the case grant specific performance of the contract.

The interest conferred by the agreement in question was an interest commensurate with the relief which equity would give by way of specific performance, and if the plaintiff Miller had in his application attempted to define the nature of his interest, he could only so define it. Further, if the registrar had, as in their Lordships' opinion he ought to have done, specified on the register the nature of the interest which he registered as a charge, he could only have so specified it. Had he attempted further to define the interest, had he, for example, stated it as an equitable fee subject to the payment of the purchase-money, he would have been usurping the function of the Court, and affecting to decide how far the contract ought to be specifically performed. As a matter of fact the registrar did not, any more than the plaintiff Miller, attempt to define the interest in respect of which registration was granted. He granted registration, having (their Lordships will assume) first entered a copy of the agreement in the register of instruments under Section 116, but the register merely shows that the plaintiff Miller is entitled to a charge under the agreement on the land in question, and leaves the nature of the charge to be inferred. At most, therefore, the plaintiff Miller became the registered owner of an interest commensurate with the interest which, under all the circumstances, equity would

decree by way of specific performance of the agreement.

Their Lordships are now in a position to deal with the question whether the second deed of 14th June, 1905, was admissible in evidence. First, as regards the defendant Mary Jane Sheard, it was not (having regard to Section 75 of the Act) admissible to disprove the *prima facie* title conferred on her by her entry on the register as owner of the absolute fee, unless such entry had been obtained by fraud in which she had participated or colluded. But as a matter of fact it was quite unnecessary to adduce the deed as evidence against her at all. She did not defend the counter-claim, thereby admitting the title of the defendant Mildred Howard, as alleged in the counter-claim, and, further, she had on two several occasions admitted this title before the commencement of the litigation—first in her affidavit for the purpose of obtaining letters of administration to Harry Howard's estate, and, secondly, in proceedings which she took (apparently at the instigation of the plaintiff Miller) to have the agreement of 1st June, 1908, adopted by the Court on behalf of the defendant Mildred Howard. These admissions, unless satisfactorily explained, would, in their Lordships' opinion, be sufficient to rebut the *prima facie* title conferred by registration.

Again, as regards the plaintiff, Miller, it is quite true that, by reason of Section 75, the second deed of 14th June, 1905, is not admissible in disproof of his registered title, but if, as their Lordships have pointed out, he is registered only in respect of an interest commensurate with the relief which equity would decree by way of specific performance of the agreement of 1st June, 1908, the defendant Mildred Howard is not under the necessity of in any way disputing the title in question. She adduces the deed of 14th June 1905, not as disproving the plaintiffs' title, but as a material circumstance which the Court must take into account in deciding the extent to which specific performance ought to be granted. In their Lordships' opinion, therefore, the objection to the admissibility in evidence of the second deed of 14th June, 1905, cannot be sustained, and the defendant Mildred Howard is therefore entitled to

the declaration of her title as alleged in her counter-claim.

The defendant Mildred Howard asks also for certain consequential relief by way of rectification of the register and cancellation of existing certificates of title. The Court under Section 92 of the Act has jurisdiction in an action contesting a registered title to make such order as may be just and appropriate under the circumstances. According to this section, before such an action can be brought, the proposed plaintiff should file an issue and give security to the satisfaction of the registrar, and it is possible that the plaintiffs might have obtained a stay of the counter-claim till this had been done. They did not, however, apply for such a stay, nor did they make any objection before their Lordships' Board on the ground that no security had been given and no issue filed. In their Lordships' opinion, therefore, it was open to the Courts below to make, and is open to their Lordships to advise His Majesty to make, such order under Section 92 as may meet the justice of the case.

With regard to the relief to which the plaintiffs are entitled in this action, it would be contrary to all principle to order the defendant Mary Jane Sheard to convey an interest which she has not got and which she cannot convey. The plaintiffs are, however, entitled to repayment of all moneys paid to her under the agreement of 1st June, 1908, with interest at 4 per cent. per annum, and their costs of action (except in so far as increased by the joinder of her co-defendant), and a lien for such moneys, interest and costs on her dower interest, in the land in question.

Taking all the circumstances into consideration, their Lordships are of opinion and will humbly advise His Majesty (1) that the orders appealed from should be discharged; (2) that the action should be dismissed with costs throughout as against the defendant Mildred Howard; (3) that on the counter-claim of the last-named defendant there should be a declaration that notwithstanding the entry on the register she is absolutely entitled to the land in question subject to the dower interest therein of the defendant Mary Jane Sheard, and that the register should be rectified by striking out the entry of the defendant Mary Jane Sheard as owner of the absolute fee in the

land in question and entering the defendant Mildred Howard as owner of such absolute fee subject to the dower interest of the defendant Mary Jane Sheard, which dower interest should be entered in the Register of Charges, and that the certificate of title granted to the defendant Mary Jane Sheard should be delivered to the Registrar for cancellation, and that the plaintiffs should pay the costs of the counter-claim; (4) that the defendant Mary Jane Sheard should be ordered to repay to the plaintiffs the moneys already paid by the plaintiff Miller under the agreement, with interest at 4 per cent. per annum, on the costs of the action (except so far as increased by the joinder of the defendant Mildred Howard) and that it should be declared that such moneys, interest, and costs are a lien on the dower interest of the defendant Mary Jane Sheard in the land in question, and that the registrar amend the certificates of title issued to the plaintiffs so to conform with this report; and (5) that the plaintiffs should pay the costs of this appeal.

T. A. R. *Appeal allowed.*

Solicitors for Appellant — Lawrence Jones and Co.

Solicitors for Respondents — Armitage, Chapple and Macnaghten.

A. I. R. 1914 Privy Council.

(FROM BRITISH COLUMBIA.)

2nd November, 1914.

VISCOUNT HALDANE L. C., LORD MOULTON, LORD SUMNER, SIR CHARLES FITZPATRICK AND SIR JOSHUA WILLIAMS.

John Deere Plow Company Limited—Appellants

v.

Theodore F. Wharton—Respondent.

and

The Same v. Duck.

And Connected appeal consolidated.

Attorney-General for the Dominion of Canada and Attorney-General for the Province of British Columbia—Intervnants.

On Appeal from the Supreme Court of British Columbia.

Ultra vires—Canada—The legislature of the Province of British Columbia has no authority to affect the status and powers of a Dominion

Company incorporated under the Letters Patent issued under the Companies Act of the Dominion of Canada (R. S. Can. 1906, C. 39), Part VI of the Companies Act of British Columbia (R.S.B.C. 1911, C. 39) is ultra vires under British North America Act, 1867 (30 and 31 Vict., C. 3) Ss. 91 and 92—Exhaustive definitions of the meaning and scope of expressions are not to be attempted but decisions should be confined to concrete questions which have actually arisen in circumstances the whole of which are before the Court.

The appellants are a company incorporated by Letters Patent under the Companies Act of the Dominion with power to carry on throughout the Dominion and elsewhere the business of dealer in agricultural implements. The respondent Wharton sued to restrain the company from carrying on business till it is licensed under Part VI of the Companies Act of British Columbia, the requisite license having been refused by the Registrar under Section 18 for the reason that a company had already been registered in the Province under the same name.

Held, The general power of the Parliament of Canada under Section 91, Enumeration 2 of the British North America Act, 1867 to legislate for the regulation of trade and commerce enables that Parliament to prescribe to what extent the powers of companies, the objects of which extend to the Dominion, should be exercisable and the limitations to be placed thereon.

Citizens Insurance Co. v. Parsons—Approved. *Colonial Building and Investment Association v. Attorney-General for Quebec Bank of Toronto v. Lambe*—Referred to.

The status and powers of Dominion Company as such cannot be destroyed by provincial legislation. Therefore, Sections 2, 18, 139, 141, 152 and 168 which in effect provide that a Dominion Company shall be licenced or registered under the Act as a condition for carrying on business or maintaining proceedings in the Courts of the Province are *ultra vires* of the Provincial Legislature, under Sections 91 and 92 of the British North America Act, 1867.

Obiter.—It is impracticable to mark out logical disjunctions between the various powers conferred by Sections 91 and 92 and between their various sub-heads *inter se* owing to the degree to which the connotation of expression used overlaps. Courts have to determine on the facts before them the lines of demarcation to be drawn in construing the application of the sections to actual concrete cases.

F. W. Wigenast—for Appellants.

Newcombe and Raymond Asquith—for Attorney General for Canada.

Laufleur—for Respondent.

R. Finlay and Geoffrey Lawrence—for Attorney-General for British Columbia.

Viscount Haldane:—These are consolidated appeals from judgments of the Supreme Court of British Columbia. The Attorney-General for the Dominions

and the Attorney-General for the Province have intervened.

By the first of the judgments the appellant company was restrained at the suit of the respondent Wharton from carrying on business in the Province until the company should have become licensed under Part VI of the British Columbia Companies Act. By the second judgment the appellants' action against the respondent Duck for goods sold and delivered was dismissed. The real question in both cases is one of importance. It concerns the distribution between the Dominion and the Provincial Legislatures of powers as regards incorporated companies.

The appellants are a company incorporated in 1907 by Letters Patent issued by the Secretary of State for Canada under the Companies Act of the Dominion. The Letters Patent purported to authorize it to carry on throughout Canada the business of a dealer in agricultural implements. It has been held by the Court below that certain provisions of the British Columbia Companies Act have been validly enacted by the Provincial Legislature. These provisions prohibit companies which have not been incorporated under the law of the provinces from taking proceedings in the Courts of the Province in respect of contracts made within the province in the course of their business, unless licensed under the Provincial Companies Act. They also impose penalties on a company and its agents if, not having obtained a license, it or they carry on the company's business in the Province. The appellant was refused a license by the Registrar. It was said that there was already a company registered in the Province under the same name, and Section 18 of the provincial statute prohibits the grant of a license in such a case. The question which has to be determined is whether the legislation of the Province which imposed these prohibitions was valid under the British North America Act.

The Companies Act of the Dominion provides by Section 5 that the Secretary of State may, by Letters Patent, grant a charter to any number of persons not less than five, constituting them and others who have become subscribers to a memorandum of agreement a body corporate and politic for any of the purposes

or objects to which the legislative authority of the Parliament of Canada extends, with certain exceptions which do not affect the present case. The Interpretation Act of 1906, by Section 30, provides, among other things, that words making any association or number of persons a corporation shall vest in such corporation power to sue and be sued to contract by their corporate name, and to acquire and hold personal property for the purposes for which the corporation is created, and shall exempt individual members of the corporation from personal liability for its debts, obligations, or acts, if they do not violate the provisions of the Act incorporating them.

Section 10 of the Companies Act makes it a condition of the issue of the Letters Patent that the applicants shall satisfy the Secretary of State that the proposed name of the company is not the name of any other known incorporated or unincorporated company, or one likely to be confounded with any such name; and Section 12 gives him large powers of interference as regards the corporate name. Section 29 provides that on incorporation the company is to be vested with, among other things, all the powers, privileges and immunities requisite or incidental to the carrying on of its undertaking, as if it were incorporated by Act of Parliament. Section 30 enacts that the company shall have an office in the city or town in which its chief place of business in Canada is situate, which shall be the legal domicile of the company in Canada; and that the Company may establish such other offices and agencies elsewhere as it deems expedient. By Section 32 it is provided that the contract of an agent of the company made within his authority is to be binding on the company and that no person acting as such agent shall be thereby subjected to individual liability.

Turning to the relevant provisions of the British Columbia Companies Act, these may be summarized as follows:—An extra-provincial company means any duly incorporated company other than a company incorporated under the laws of the Province or the former colonies of British Columbia and Vancouver Island (Section 2). Every such extra-provincial company having gain for its object must be licensed or registered under the law of

the Province, and no agent is to carry on its business within the Province until this has been done (Section 139). Such license or registration enables it to sue and to hold land in the Province (Section 141). An extra-provincial company, if duly incorporated by the laws of among other authorities, the Dominion, and if duly authorized by its charter and regulations to carry out or effect any of the purposes or objects to which the legislative authority of the provincial Legislature extends, may obtain from the registrar a license to carry on business within the Province on complying with the provisions of the Act and paying the proper fees (Section 152). If such a company carries on business without a license, it is liable to penalties (Section 167), and the agents who act for it are similarly made liable, and the company cannot sue in the Courts of the Province in respect of contracts made within the Province (Section 168). The registrar may refuse a license when the name of the company is identical with or resembling that by which a company, society, or firm in existence is carrying on business, or has been incorporated, licensed, or registered, or when the registrar is of opinion that the name is calculated to deceive, or disapproves of it for any other reason (Section 18).

The charter of the appellant company was granted under the seal of the Secretary of State of the Dominion in 1907. It purported, as already stated, to confer power to carry on throughout the Dominion of Canada and elsewhere the business of a dealer in agricultural implements and cognate business, and to acquire real and personal property. It is not in dispute that it was an extra-provincial company having gain for its object. The chief place of business was to be Winnipeg. The registrar refused, as has been mentioned, to grant a license under the provincial Act to the appellant company. The power of the registrar is not challenged, if the Sections of the provincial statute under which he proceeded were validly enacted.

What their Lordships have to decide is whether it was competent to the Province to legislate so as to interfere with the carrying on of the business in the Province of a Dominion company under the circumstances stated.

The distribution of powers under the British North America Act, the interpretation of which is raised by this appeal, has been often discussed before the Judicial Committee and the tribunals of Canada, and certain principles are now well settled. The general power conferred on the Dominion by Section 91 to make laws for the peace, order, and good Government of Canada extends in terms only to matters not coming within the classes of subjects assigned by the Act exclusively to the Legislatures of the Provinces. But if the subject-matter falls within any of the heads of Section 92, it becomes necessary to see whether it also falls within any of the enumerated heads of Section 91, for if so, by the concluding words of that section, it is excluded from the powers conferred by Section 92.

Before proceeding to consider the question whether the provisions already referred to of the British Columbia Companies Act, imposing restrictions of the operations of a Dominion company which has failed to obtain a provincial licence, are valid, it is necessary to realize the relation to each other of Sections 91 and 92 and the character of the expressions used in them. The language of these sections and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme. The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at Quebec in October, 1864. To these resolutions and the sections founded on them the remark applies which was made by this Board about the Australian Commonwealth Act in a recent case *Attorney-General for the Commonwealth v. Colonial Sugar Refining Co.* (1), that if there is at points obscurity in language, this may be taken to be due, not to uncertainty about general principle, but to that difficulty in obtaining ready agreement about phrases which attend the drafting of legislative measures by large assemblages. It may be added that the form in which provisions in terms overlapping each other have been placed side by side shows that those who passed the Confederation Act intended to leave the working

(1) [1914 A. C. 254.]

out and interpretation of these provisions to practice and to judicial decision.

The structure of Sections 91 and 92, and the degree to which the connotation of the expressions used overlaps, render it, in their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry. It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided. Their Lordships adhere to what was said by Sir Montague Smith in delivering the judgment of the Judicial Committee in *Citizens Insurance Co. v. Parsons* (2) to the effect that in discharging the difficult duty of arriving at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers which they contain and give effect to them all, it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand. The wisdom of adhering to this rule appears to their Lordships to be of especial importance when putting a construction on the scope of the words "civil rights" in particular cases. An abstract logical definition of their scope is not only, having regard to the context of Sections 91 and 92 of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases. It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them, may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the Province, as the case may be, have to be examined with reference to the actual facts, if it is to be possible to determine under which set of powers it falls in substance and in reality. This may not be difficult to determine in actual and con-

crete cases. But it may well be impossible to give abstract answers to general questions as to the meaning of the words, or to lay down any interpretation based on their literal scope apart from their context.

Turning to the appeal before them, the first observation which their Lordships desire to make is that the power of the Provincial Legislature to make laws in relation to matters coming within the class of subjects forming No. 11 of Section 92 the incorporation of companies with provincial objects, cannot extend to a company such as the appellant company, the objects of which are not provincial. Nor is this defect of power aided by the power given by No. 13, "Property and Civil Rights." Unless these two heads are read disjunctively, the limitation in No. 11 would be nugatory. The expression "civil rights in the Province" is a very wide one, extending, if interpreted literally, to much of the field of the other heads of Section 92 and also to much of the field of Section 91. But the expression cannot be so interpreted, and it must be regarded as excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words. If this be so, then the power of legislating with reference to the incorporation of Companies with other than provincial objects must belong exclusively to the Dominion Parliament, for the matter is one "not coming within the classes of subjects" "assigned exclusively to the Legislatures of the Provinces," within the meaning of the initial words of Section 91, and may be properly regarded as a matter affecting the Dominion generally and covered by the expression "the peace, order, and good Government of Canada."

Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens Insurance Co. v. Parsons* (3) on head 2 of Section 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade. This head must, like the expression, "Property and Civil Rights in the Province," in Section 92, receive a limited interpretation. But their Lordships think that the power to regulate trade and commerce at all events

(2) 7 App. Cas. at P. 109.
1914 K— 23

(3) 7 App. Cas. 96 at pp. 112, 113.

enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion, should be exercisable, and what limitations should be placed on such powers. For if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade. Their Lordships are therefore of opinion that the Parliament of Canada had power to enact the sections relied on in this case in the Dominion Companies Act and the interpretation Act. They do not desire to be understood as suggesting that, because the status of a Dominion Company enables it to trade in a province, and thereby confers on it civil rights to some extent, the power to regulate trade and commerce can be exercised in such a way as to trench, in the case of such companies, on the exclusive jurisdiction of the provincial Legislatures over civil rights in general. No doubt this jurisdiction would conflict with that of the Province if civil rights were to be read as an expression of unlimited scope. But, as has already been pointed out, the expression must be construed consistently with various powers conferred by Sections 91 and 92, which restrict its literal scope. It is enough for present purposes to say that the Province cannot legislate so as to deprive a Dominion Company of its *status* and powers. This does not mean that these powers can be exercised in contravention of the laws of the Province restricting the rights of the public in the Province generally. What it does mean is that the status and powers of a Dominion Company as such cannot be destroyed by provincial legislation. This conclusion appears to their Lordships to be in full harmony with what was laid down by the Board in *Citizens Insurance Co. v. Parsons* (1), *Colonial Building and Investment Association v. Attorney-General for Quebec* (4), and *Bank of Toronto v. Lambe* (5).

It follows from these premises that those provisions of the Companies Act in British Columbia which are relied on in the present case as compelling the

appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the Province as a condition of exercising its powers of suing in the Courts, are inoperative for these purposes. The question is not one of enactment of laws affecting the general public in the Province and relating to civil rights, or taxation, or the administration of justice. It is in reality whether the Province can interfere with the *status* and corporate capacity of a Dominion company in so far as that *status* and capacity carry with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion. Their Lordships are of opinion that this question must be answered in the negative.

In the course of the argument their Lordships gave consideration to the opinions delivered in 1913 by the judges of the Supreme Court of Canada in response to certain abstract questions on the extent of the powers which exist under the Confederation Act for the incorporation of companies in Canada. Two of these questions bear directly on the topics now under discussion. The sixth question was whether the Legislature of a province has power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province in the absence of a licence from its Government, if fees are required to be paid upon the issue of such licence. The seventh question was whether the Provincial Legislature could restrict a company so incorporated for the purpose of trading throughout the whole Dominion in the exercise of the special trading powers so conferred, or could limit such exercise within the province. This question further raised the point whether a Dominion trading company was subject to provincial legislation limiting the business which corporations not incorporated under the legislation of the province could carry on, or their powers, or imposing conditions on the engaging in business by such corporations, or restricting a Dominion Company otherwise in the exercise of its corporate powers or capacity.

Their Lordships have read with care the opinions delivered by the members of the Supreme Court, and are impressed by the attention and research which the

(4) 9 App. Cas. 157.

(5) 12 App. Cas. 575.

learned Judges brought to bear, in the elaborate judgments given, on the difficult task, imposed on them. But the task imposed was, in their Lordships' opinion, an impossible one, owing to the abstract character of the questions put. For the reasons already indicated, it is impracticable to attempt with safety definitions marking out logical disjunctions between the various powers conferred by Sections 91 and 92 and between their various sub-heads *inter se*. Lines of demarcation have to be drawn in construing the application of the sections to actual concrete cases, as to each of them individually the Courts have to determine on which side of a particular line the facts place them. But while in some cases, it has proved, and may hereafter prove, possible to go further and to lay down a principle of general application, it results from what has been said about the language of the Confederation Act, that this cannot be satisfactorily accomplished in the case of general questions such as those referred to. It is true that even when a company has been incorporated by the Dominion Government with powers to trade, it is not the less subject to provincial laws of general application enacted under the powers conferred by Section 92. Thus, notwithstanding that a Dominion Company has capacity to hold land, it cannot refuse to obey the statutes of the Province as to Mortmain—*Colonial Building and Investment Association v. Attorney General of Quebec* (4) or escape the payment of taxes, even though these may assume the form of requiring, as the method of raising a revenue, a licence to trade which affects a Dominion Company in common with other companies *Bank of Toronto v. Lambe* (5). Again, such a company is subject to the powers of the Province relating to property and civil rights under Section 92 for the regulation of contracts generally: *Citizens Insurance Co. v. Parsons*.

To attempt to define *a priori* the full extent to which Dominion companies may be restrained in the exercise of their powers by the operation of this principle is a task which their Lordships do not attempt. The duty which they have to discharge is to determine whether the provisions of the Provincial Companies Act already referred to can be relied on as

justifying the judgments in the Court below. In the opinion of their Lordships it was not within the power of the Provincial Legislature to enact these provisions in their present form. It might have been competent to that Legislature to pass laws applying to companies without distinction, and requiring those that were not incorporated within the Province to register for certain limited purposes, such as the furnishing of information. It might also have been competent to enact that any company which had not an office and assets within the Province should, under a statute of general application regulating procedure, give security for costs. But their Lordships think that the provisions in question must be taken to be of quite a different character, and to have been directed to interfering with the status of Dominion Companies, and to prevent them from exercising the powers conferred on them by the Parliament of Canada, dealing with a matter which was not entrusted under Section 92 to the Provincial Legislature. The analogy of the decision of this Board in *Union Colliery Co. v. Bryden* (6) therefore applies. They are unable to place the limited construction upon the word "incorporation" occurring in that section which was contended for by the respondents and by the learned counsel who argued the case for the Province. They think that the legislation in question really strikes at capacities which are the natural and logical consequences of the incorporation by the Dominion Government of companies with other than provincial objects.

They will therefore humbly advise His Majesty that these appeals should be allowed, and that judgment should be entered for the appellant company in the action of *Wharton v. John Deere Plow Company Ltd.* with costs. The action by the company against the respondent Duck must, unless the parties come to an agreement, be remitted to the Court below to be disposed of in accordance with the result of this appeal. As to the interveners, the Attorney-General for the Dominion and the Attorney-General of the Province, there will be no order as regards costs. The respondents, Wharton and Duck, must pay the costs of the appellant company of this appeal, excepting

(6) [1899] A.C. 580.

so far as these have been increased by the interventions.

T. A. R.

Appeal allowed.

Solicitors for Appellants—Lawrence Jones and Co.

Solicitors for Respondents:—Linklater, Addison and Brown.

Solicitors for Interveners:—Charless Russell and Co., and Gard, Rook and Co.

A. I. R. 1914 Privy Council.

(FROM BRITISH COLUMBIA.)

15th June, 1914.

LORDS MOULTON, PARKER OF
WADDINGTON AND SUMNER.

United Buildings Corporation, Limited—
Appellants

v.

Corporation of the City of Vancouver—
Respondents.

On appeal from the Court of Appeal of
British Columbia.

(a) *Ultra vires*—*British Columbia*—*The Corporation of Vancouver has power to pass a by-law stopping a lane and leasing it under S. 125—Sub S. 52 of the Vancouver Incorporation Act, 1900 (Statute of British Columbia, C. 54) and such by-law do not require the assent of voters under the Municipal Act, 1906 (Rev. Stat. of Br. Columbia, C. 170), S. 194 as "giving a bonus"—Such by-law can be enacted in good faith even though a benefit specifically accrues to particular persons.*

Upon the petition of a company whose building lay on both sides of a lane, the Corporation of the city of Vancouver enacted a bye-law stopping up a part of lane and diverted the lane to another thoroughfare, over land conveyed by the company to the corporation of the city and the lane so stopped was leased to the petitioning company for twenty-five years at a nominal rent. Under the Vancouver Incorporation Act, 1900, Section 125, sub-Sections 52 and 215 and the Amending Act of 1907 the Corporation had power to pass by-law for stopping up lanes, the sub-section being one of a group under the head "Public Health." Under the Municipal Act, 1906, Section 194, a by-law "giving a bonus" was invalid without the assent of not less than "three-fifths in number of the electors" when duly submitted to "the electors of the Municipality" before its "final passage," which was admittedly not obtained by the Corporation:—

Held, (1) that having regard to the other matters dealt with under the head "Public Health," in Section 125 referred to above, the by-law was within the powers of the Corporation under sub-Section 52: [P. 182, C. 2.]

(2) that the exercise of the power of stopping lanes was in good faith and for purposes which

the section impliedly contemplates, though a benefit specifically accrued to particular persons thereby. *In re Inglis and City of Toronto* referred to. [P. 183, C. 1.]

(b) *Interpretation of Statute By-laws*—*Construction of by-laws*—*Sub-sections should be strictly construed to prevent Corporations from evading statutory provision for the sanction of the vote of rate-payers as a condition precedent or subsequent for the validity of a by-law, (Obiter).*

Obiter,—Where the statute imposes on a Municipal Corporation the sanction of the vote of the rate-payers as a condition, either precedent or subsequent, no elastic construction should be placed enabling the local authority to evade the restrictions of the statute. [P. 183, C. 1.]

In re Barclay and Darlington Township and In re Scott and Corporation of Tilsonbury referred to.

R. B. Finlay, Bodwell, and Lazarus—
for Appellants.

E. P. Davis, and M. Macnaughten—for
Respondents.

Lord Sumner:—On 15th July, 1912, the Corporation of the City of Vancouver enacted a by-law for the diversion of a lane in that city, which was a public highway. Part of it, which led into one thoroughfare, was stopped up and, by giving it a right-angled turn, the lane was made to lead into another instead. The corporation made provision for an extra space for vehicles to turn in at the corner. Whether that space was in fact sufficient, and whether the change itself hampered the preservation of the adjacent buildings in case of fire, are questions which do not arise before this Board. If the corporation had power to pass the by-law at all, it had authority to determine such questions. *Haggerty v. City of Victoria* (1).

The alteration in the lane was made at the instance and on the petition of the Hudson's Bay Company, whose building land lay on both sides of the part which was closed. They did not seek to assist the traffic of the locality or to promote the health of the neighbourhood. They wished to obtain a building lease of the closed part of the lane, and so to be able to erect a long unbroken block of buildings instead of two smaller ones. The corporation drove a bargain with the Hudson's Bay Company, and it has not been contended that the bargain did not secure for the city and the public an ample *quid pro quo*. Two points only in

(1) [1895] 4 Brit. Col. Rep. 163.

that bargain need be referred to. It was known, firstly, that there was opposition to the proposed by-law, and the corporation took an indemnity from the Hudson's Bay Company "against any actions or suits which may be brought against the city by reason of the passing of the by-law closing said lane and stopping up thereof." Secondly, the corporation, having discharged the closed portion of the lane from the public right of highway, leased it to the company at one dollar per annum, without taking any covenant to build on it, for twenty-five years, the longest term within the corporation's leasing powers exercisable without the express assent of the rate-payers, signified by popular vote (Section 8 of the Act of 1907 amending the Vancouver Incorporation Act, 1900.)

In enacting the by-law the corporation acted under the Vancouver Incorporation Act, 1900, Section 125, sub-Section 52. It has been argued that the transaction was one which amounted to giving a "bonus" to the Hudson's Bay Company within Section 194 of the Municipal Act, 1906, sub-Sections 171 to 184 of the Vancouver Act not applying to this transaction. If so, the by-law enacted required for its validity the assent of not less than "three-fifths in number of the electors" voting upon it when duly submitted to the "electors of the municipality" before its "final passage." There is nothing in the evidence to prove any motive for avoiding reference to the electorate, and no evidence, nor indeed any suggestion, of corruption against members of the corporation personally.

Strong opposition to the Hudson's Bay Company's petition was offered by the now appellants, who, as owners of property abutting on the unclosed portion of the lane, considered their property to be injuriously affected. On the other hand, the petition had the support of an actual majority of the owners of property in the lane. The appellants as rate-payers obtained a rule *nisi* calling on the corporation to show cause why the by-law should not be quashed, on the grounds that the closing of the lane was not in the interest of the public but was solely in the interest of the Hudson's Bay Company, that it worked hardship to the ratepayers, and was *ultra vires*. Evidence on affidavit was filed, and eventually Clement, J. dis-

charged the rule. An appeal was taken to the Court of Appeal of the Province of British Columbia, and the members of that Court being evenly divided in opinion, it stood dismissed, and leave was given to appeal to their Lordships' Board.

The grounds taken before their Lordships have been two fold; *First*, it was said that there was no power to enact this by-law under Section 125, sub-Section 52, because it was not a matter of public health; *secondly*, it was said that the exercise of the power, if any, was not in good faith, but was actuated by motives, and resorted to for purposes, other than those which the section impliedly requires. The latter ground may be taken first.

The direct evidence is that of three aldermen, members of the Board of Works, who swear that the Board, before whom the matter came, decided unanimously, considering the request a reasonable one and thinking that, in the interests of the city, it ought to be granted, in view of the class of building which the Hudson's Bay Company proposed to erect, and of the facilities offered in return to the other owners in the block in question. Each added his opinion that the change improved the access of light to buildings in the lane and did not injuriously affect any of the owners in the other lots. To the facts thus deposed to there was no contradiction in the evidence filed, though there was evidence that the opposite opinion was entertained by other persons. The statement of these aldermen of course is not conclusive, but it is entitled to very serious consideration. No fact was urged against it except the character of the transaction itself. The personal credit of these deponents was not impugned at all. There can be no doubt on the facts that the site leased will be built on by the lessees in their own obvious interest, though they have not covenanted to do so. It is easy, especially for those who conceive themselves to be sufferers by it, to suspect and to suggest and even to argue with some plausibility that such a transaction cannot have been carried through without some improper or sinister motive on the part of those members of the corporation who voted for it, in this case all who were voting: and, since opinions differed on this question in the Court below, their Lordships recognize freely that it might

bear one aspect or the other, but judging it, as they must do, upon a judicial survey of the whole proved materials, with the experience of men of the world and the full persuasion that such a charge must be proved by those who make it, their Lordships are unable to differ from the opinion of those members of the Court below who held that the transaction was free from impropriety or bad faith.

Two grounds were urged for the contention that there was no jurisdiction to enact the by-law. The first was that sub-Section 52 is to be limited to such acts named therein as are done for purposes of public health. This is inferred from the heading of the fasciculus of sub-sections to which sub-Section 52 belongs, and also from the character of the acts named in the other sub-sections within the fasciculus as well as in the sub-section itself. The second ground is that the public health powers and the bonus powers of the corporation must be deemed to be mutually exclusive, especially as the first may be exercised without any ratification by a popular vote, while the second requires it. Hence it is said that as the transaction fell within the bonus powers, the sub-section conferring public health powers cannot be construed so as to cover it.

The material words of Section 125 and sub-Section 52 are as follows:—Section 125.

"The council may from time to time pass, alter and repeal by-laws:—.....Public Health.....(52.) For stopping up.....lanes.....within the jurisdiction of the council."

Other matters dealt within this sub-section are:—

"Making.....improving, repairing.....altering.....sewers, water-courses.....streets, squares.....taking or using any land in any way necessary or convenient for the said purposes; conducting the drains and sewers beyond the limits of the said city for fertilizing purposes.....and for entering upon.....any land in any way necessary or convenient for the said purpose, and repairing and maintaining all bridges."

That the titles, which a statute prefixes to parts of the Act, may be looked at as aids to the interpretation of the language of such parts is well settled, but the assistance to be derived from such consideration varies very much. The title here is "Public Health," an expression often used very comprehensively and often including much that is only concerned with public welfare. Examination of the

specific matters enumerated in this fasciculus of sub-sections shows that the scope of this part of the Act is general. They range from prescribing "the duties of health officers and scavengers" (35), and "filling or closing" any waterclosets, privies.....or cesspools (50), to the repair of bridges (52), and the regulation of the weight of bread (55); from "ordering the removal of laundries from any particular locality where, in the opinion of the council, such laundries are.....an eyesore to the locality" (40), to "preventing the encumbering by.....vehicles, vessels, or other means of any.....river or water or any road.....bridge, or other communication" (41), and to declaring "any.....structure.....dangerous to the public safety".....and ordering "that the same shall be removed" (48). It is not impossible that these last mentioned matters may have some connection, though remote, with the physical and moral health of the community, but they seem to have as little to do with public health in this sense as with eugenics. A similar observation arises on sub-Sections 21 to 33, which are headed "Public Morals" and include the regulation of bowling alleys (29), and the prohibition of the sale of cigarettes to children (21), on the one hand, and on the other the prevention of brothel-keeping (26), and indecent exposure of the person, and also on sub-Sections 63 to 77, which under the title of "Markets" extend from light, weight and short measure (76) to forestalling and regrating (68). The question is one of construction only, and their Lordships agree with Martin Justice, in the Court below, that Section 125 has been drawn generally so as to combine together various powers many of which are of analogous character, but without adhering to strict classification.

There are various minor difficulties in the way of those who seek to quash this by-law, which may be dismissed shortly. So far as the by-law in question stops up part of the lane and diverts the rest it was made honestly within the powers given by Section 125, sub-Section 52. Only by introducing the resolution to lease the disused part to the Hudson's Bay Company, is any semblance produced of giving "any bonus" and this has been carried out by the actual grant of a sub-

sisting lease. The procedure for quashing a by-law (Sections 127—132) and the application and rule *nisi* in the actual case do not extend to setting aside the lease. Their Lordships think that this point of form should not be passed over. Further, there is a separate power of leasing under the principal Vancouver Act, of 1900, section 125, sub-Section 215, and Section 8 of the amending Act of 1907. This power of leasing lanes or portions of lanes, if the lease is for a period not exceeding twenty-five years, may be exercised without the assent of the electors. It applies to portions of lanes disused because the thoroughfare is stopped, and cannot well apply to them till it is stopped. It is true that the power to lease for twenty-five years is contained in a proviso upon the older sub-section of 1900, but it would be an untenably narrow construction of that sub-Section to say that the power of leasing is confined to such property as has been obtained under a by-law made by the Corporation. It is enough that it be property at one time required for the use of the corporation, and no longer so required.

The remaining argument is one of great public importance, but the facts do not raise it in the present case in a shape which involves any new decision upon it. Where the competent Legislature has imposed on a municipal corporation such a condition, either precedent or subsequent, to the exercise of its powers as the sanction of a vote of the rate payers, it is essential that no elastic construction should be placed upon a sub-section which would enable the local authority to evade the restrictions of the statute. (See *In re Barclay and Darlington Township* (2), *per* Sir J. B. Robinson, and *In re Scott and Corporation of Tilsonbury* (3), *per* Hagarty, C. J.). But though the operation of a by-law benefits one or more persons more than others, it does not follow that by enacting it a corporation must be taken to "give any bonus" within the Municipal Act, 1906, Section 194, nor can a by-law be said to be outside the powers conferred by Section 125 of the Vancouver Act, 1900, merely because steps taken in the public interest are accompanied by benefit specifically ac-

cruing to private persons; *In re Inglis and City of Toronto* (4). If no one could benefit by this by-law but the Hudson's Bay Company, and the whole advantage to the public at large, or to other members of the public, was to be found in the consideration moving from the Hudson's Bay Company to the corporation, the matter might well be otherwise. Here, however, the by-law was supported by a majority of property owners affected, who are not shown to have had any interest but that which consisted in the alteration of the lane itself, and there is uncontradicted evidence of a belief on the part of those or some of those enacting the by-law that the alteration in the lane was a public, though a local improvement in facilitating the access of light. This last fact alone is enough to distinguish the cases of *In re Peak and Corporation of Galt* (5), *In re Morton and Corporation of St. Thomas* (6), *Pells v. Boswell* (7), and *In re Waterous and Corporation of Brantford* (8), which are in some respects similar. There is no sufficient juridical reason for rejecting this evidence. Their Lordships cannot speculate about the unascertainable motives of unknown persons. They must act on the evidence as it stands. To those familiar with the *locus in quo* it may seem improbable, or even impossible, that the advantages, to be derived from the change in the lane itself were the reason for enacting the by-law, but as the plaintiffs shaped and left their case, it is quite consistent with the possibility that the mere alteration in the lane itself was, partly and even largely, for the general benefit and was an improvement in the interior communications of the City for the benefit of the public health in a wide sense of the term. This being so, and no bad faith or improper conduct being shown, their Lordships are unable to say that the decision of the Court below was wrong, and will humbly advise His Majesty that this appeal should be dismissed with costs.

T. A. R.

Appeal dismissed.

Solicitors for Appellants—Gard, Rook and Co.

Solicitors for Respondents—Bischoff, Cox, Bompas and Bischoff.

(4) 9 Ont. L.R. 562.

(5) (1881) 46 Upper. Can. Q.B. 211.

(6) 6 Ont. App. Rep. 323.

(7) 8 Ont. Rep. 680.

(8) 2 Ont. W. R. 897 = 4 Ont. W. R. 355.

(2) (1854) 12 Upper. Can. Q.B. 86.

(3) 13 Ont. App. Rep. 233.

A. I. R. 1914 Privy Council.
(FROM THE ISLAND OF JERSEY.)

17th December, 1914.

LORDS SHAW OF DUNFERMLINE,
PARKER OF WADDINGTON,
SUMNER AND SIR JOSHUA WILLIAMS.

Eliza F. T. Higgs Vatcher and others—
Appellants

v.

*Henry Paull and others—*Respondents.

On Appeal from the Royal Court of the
Island of Jersey.

(a) *Fraud on power—Island of Jersey—Power of appointment exercised under a marriage settlement is valid even though there is a defeasance clause on a condition to be performed by a third party—"Fraud on Power" defined and distinguished from "Fraud" in common law—Four necessary ingredients to constitute "Fraud"—Full particulars of fraud should be given in the pleadings.*

Under a settlement made in England in 1846 in contemplation of his second marriage, a husband and the intended second wife had a joint power of appointment over a settled fund among the husband's children and their issue whether by his first or second marriage. In 1857 they took up their abode in the island of Jersey and real estate was acquired. By a joint deed dated 22nd March, 1882, they appointed the settled fund in favour of their own family, with a proviso that the appointment should be void if the issue of the first marriage should abandon their rights in the appointor's real estate. The husband died in 1886. Under the law of Jersey no person dying before 1891 had any power to alter the devolution of his real estate in accordance with that law:—

Held, that the appointment was a valid exercise of the power, as it neither infringed the English rule against perpetuities nor constituted a fraud on the power.

"Fraud on power" is different from "Fraud" as understood in common law and merely means that the power has been exercised for a purpose or with an intention beyond the scope of the instrument creating the power, as when the appointor bargained for a benefit to himself or some other person, not an object of the power.

Badler v. Pratt and *In re Perkins* referred to.

It is not a "fraud on power" if the condition to be performed is one if at all it will be performed by third parties over whose actions the appointees have no control.

In re Perkins and *Stroud v. Norman* distinguished.

(b) [Evidence Act, S. 114]—The general presumption is in favour of the good faith and validity of transactions which have long stood unchallenged and inferences should not be lightly drawn against acts and documents of deceased persons.

Upon proceedings instituted in 1910 to set aside a contract on the ground of a fraudulent misrepresentation made in 1886, that is, 24 years after

the alleged fraud, there is a general presumption of law in favour of the good faith and validity of transactions which have long stood unchallenged and though the known facts and existing documents may give rise to suspicion, if they are capable of a reasonable explanation, the Court ought not to draw inferences against the integrity of persons who have long been dead and cannot therefore defend themselves. *In re Porthlethwaite* followed.

(c) *Privy Council—Practice—Board will interfere with concurrent findings of fact under only peculiar circumstances.*

The Board will interfere with concurrent findings of fact only under the peculiar circumstances of this case, namely (1) that the view of the Courts below was coloured by the evidence of a fraudulent conspiracy and (2), that the Board was in as good a position as the lower Courts in appreciating the evidence as all the evidence was taken on deposition.

(d) *Fraud—Ingredients indicated—Particulars necessary—Pleadings.*

Ingredients to establish fraud:—It must be proved (1), that a representation was made (2), that the representation was untrue (3), that it was untrue to the knowledge of the person making it and (4) the contract was thereby induced.

Full particulars of fraud ought to be given in the pleadings either as originally framed or as amended for the purpose.

Younger, H. E. le V. dit Durrell (Attorney-General for Jersey), *Dighton Pollock*, and *C. T. le Quesne*—for Appellants.

Jenkins, Grimwood Mears and *M. Alavoine*—for Respondents.

Lord Parker of Waddington:—Two points arise for decision in the present case. The first is whether the appointment of 22nd March, 1882, is a valid appointment, a question which is for the most part a question of law. The second is whether the contract of 18th August, 1886, was induced by fraud and ought therefore to be set aside, a question which is for the most part a question of fact.

The late Henry Vatcher, senior, who was born in England, was twice married, first to Margaret Way, who died in 1843, and secondly to Eliza Frances Tonkin Higgs. There was issue of the first marriage two children, namely, Margaret, who married a Mr. Torkington, and Henry who married Maria George Andrew, spinster, and died in 1868, leaving issue the respondents Maria Florence Paull and Ellen Vatcher. There was issue of the second marriage of Henry Vatcher, senior, six children namely, the appellant John Sidney Adolphus Vatcher, the appellant Edith Mary Atkinson, Bessie Gertrude, who died in 1885, without issue

the respondent Charless Gardner Vatcher, the appellant James Raynold Morley Vatcher, and the appellant Rose Ethel Monckton.

By an indenture of settlement dated 6th April, 1846, (being a settlement made in contemplation of the second marriage of Henry Vatcher, senior), certain funds of the value of £8000, or thereabouts were settled upon trusts for the payment of the income thereof during the joint lives of Henry Vatcher, senior, and his second wife in manner therein provided, and after the death of Henry Vatcher, senior, in case his second wife should survive him, to the second wife during her life or until remarriage. And, subject as aforesaid, in trust for the children of Henry Vatcher, senior, whether by his first or second marriage, or the issue of such children born in the life-time of Henry Vatcher, senior, and the second wife or of the survivor of them in such shares, upon such conditions, and in such manner as Henry Vatcher, senior, and his second wife should by writing appoint, and in default of such appointment as the survivor of them should by writing or by will appoint, and in default of any such appointment in trust for the children of the said Henry Vatcher, senior, by either marriage who being males should attain twenty-one years or being females should attain that age or marry and the issue of any male child who should die under twenty-one years of age leaving issue who should be living at the period of distribution, to be divided between them if more than one in equal shares, the issue of any deceased male taking *per stirpes* and not *per capita*.

By virtue of certain further indentures dated respectively 19th October, 1847, and 19th May, 1855, certain further funds were settled upon trusts similar in all respects to those declared by the settlement of 6th April, 1846, except that there was no power of appointment conferred on the survivor of Henry Vatcher, senior and his second wife. The aggregate value of the settled property at the death of Henry Vatcher, senior, was about £27,000.

In the year 1857, Henry Vatcher, senior, with his wife and family took up their abode in the island of Jersey.

In the year 1863 he and his second wife purchased jointly with benefit of

survivorship a residential property in the island known as "Rosemount," and made their home there. Between the year 1865, and the time of his death Henry Vatcher, senior, made several further purchases of real property in the island. Some of the properties purchased were conveyed to Henry Vatcher, senior some to Henry Vatcher, senior and the appellant John Sidney Adolphus Vatcher jointly with benefit of survivorship, and some to Henry Vatcher, senior and the appellant John Sidney Adolphus Vatcher jointly for themselves and their heirs. In every case the greater part of the purchase price was satisfied by the creation of "rentes" or incumbrances on the property then or previously purchased.

By a deed of appointment dated 22nd March, 1882, Henry Vatcher senior, and his second wife appointed that the funds settled by the said indentures of 6th April, 1846, 19th October, 1847, and 19th May, 1855, should be held by the respective trustees thereof after the decease of the survivor of them the said Henry Vatcher, senior and his second wife, upon trusts which were declared as follows: that is to say—

"To pay and divide the same unto between and among the child, children or other issue of the said Henry Vatcher, by his said wife, Eliza Frances Tonkin Vatcher, when and if they shall attain the age of twenty-one years, but so that such children shall take *per stirpes* and not *per capita*, it being our intention to exclude Margaret Torkington, a daughter of me, the said Henry Vatcher, and the children of Henry Vatcher, a son of me, the said Henry Vatcher, from all participation in any appointment hereby made. Provided, and we lastly declare, that this our appointment is to be revocable by us at any time and that in case the said Margaret Torkington and the two children of the said Henry Vatcher the son, shall upon the death of me, the said Henry Vatcher, and of me, the said Eliza Frances Tonkin Vatcher, absolutely renounce, decline and abandon as tenants by their procurer or otherwise all rights and claim to which they or either of them may be entitled to or upon the real estate or freehold and leasehold property or lands and rents to which either of us at our death may be entitled under the law of Jersey, or otherwise, the appointment hereby made shall be at an end and absolutely void."

It was suggested in the evidence of English Law before the Jersey Courts that this appointment was void as infringing the English rule against perpetuities. The suggestion, however, was not pressed before their Lordships' Board; indeed it is in their Lordships' opinion reason-

ably clear as a matter of construction that the issue to take under the appointment are issue living at the death of the survivor of Henry Vatcher, senior, and his second wife, and all such issue must necessarily attain the age of twenty-one years within the period allowed by the rule. The only objection to the appointment urged before their Lordships was that it constituted a fraud on the power.

The term "fraud" in connection with frauds on a power does not necessarily denote any conduct on the part of the appointer amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. Perhaps the most common instance of this is where the exercise is due to some bargain between the appointer and appointee, whereby the appointer, or some other person not an object of the power, is to derive a benefit. But such a bargain is not essential. It is enough that the appointer's purpose and intention is to secure a benefit for himself, or some other person not an object of the power. In such a case the appointment is invalid, unless the Court can clearly distinguish between the *quantum* of the benefit *bona fide* intended to be conferred on the appointee and the *quantum* of the benefit intended to be derived by the appointer or to be conferred on a stranger: see *Sadler v. Pratt* (1) and *In re Perkins* (2).

In the present case, by the very terms of the settlement creating the power, the donee is entitled to appoint to one or more of the objects of the power exclusively of the others or other of them. He is also entitled to appoint upon condition. The mere fact, therefore, that he intended to benefit the issue of the second to the exclusion of the issue of the first marriage cannot be alleged against the validity of the execution of the power, nor is it any objection to the validity of such execution that the appointment is subject to a condition subsequent with a defeasance in case the condition be performed. If, therefore, the appointment is open to any

objection it must be by reason of the nature of the condition imposed.

It should be noticed that in the present case the condition is not one to be performed by the appointees; it is to be performed if at all by third parties over whose actions the appointees have no control. The case therefore is clearly distinguishable from *In re Perkins* (2) and also from *Stroud v. Norman* (3). It is also unlike these cases in another respect, namely that the defeasance in case the condition is fulfilled is not inserted with a view to an alternative appointment, but with the intention that on performance of the condition the funds are to go upon the trusts limited by the settlement in default of appointment. In their Lordships' opinion both grounds of distinction are of importance. Apart from cases of appointments made in pursuance of a bargain under which the appointer or a person not an object of the power is to derive a benefit there is no authority for holding an appointment bad because it is made on a condition to be performed not by the appointee, but by a third party. The real vice of an appointment on condition that the appointee shall benefit the appointer or a third party is that the power is used not with the single purpose of benefiting its proper objects but in order to induce the appointee to confer a benefit on a stranger, and obviously this vice is absent where the condition is not to be performed by the appointee. Nor is there any case in which a bargain to allow the funds to go in default of appointment or a condition the performance of which will leave the funds to go in default of appointment has been successfully impeached. The limitations in default of appointment may be looked upon as embodying the primary intention of the donor of the power. To defeat this intention the power must be *bona fide* exercised for the purpose for which it was given. A bargain or condition which leads to the fund going in default of appointment can never, therefore, defeat the donor's primary intention. Even in the case of a condition to be performed by the appointee the condition does not necessarily invalidate the appointment. As explained by SIR WILLIAM PAGE WOOD IN

(1) [1883] 5 Sim. 632.

(2) [1893] 1 Ch. 283.

(3) Kay, 313.

Stroud v. Norman (3) it can only do so if the purpose of the appointer in imposing it is to benefit himself or a third person not an object of the power. It is not enough that the appointer or some person not an object of the power may conceivably derive some benefit. If this were not so no father could appoint in favour of an infant child, because if the infant died under twenty-one the father himself would take as next-of-kin. In order to avoid such appointment it must be proved affirmatively, or the inference to be drawn from the circumstances must be, that the purpose of the appointment is not to benefit the infant but to benefit the appointer through the infant. This is the real answer to the powerful argument put forward on behalf of the respondent by Mr. Jenkins. Though, he said, the renunciation by the first family would enure for the benefit of the second family under the state of circumstances in which the appointment was made, it was none-the-less possible that the second family might all of them predecease the appointer, in which case it could enure only to the benefit of strangers. Nobody can doubt, however, that the real purpose of the condition was to ensure that the second family, all of them objects of the power, should either (1) take the whole of the settled funds or (2), if the first family renounced the real estate in their favour, their share in such funds as in default of appointment. The mere fact that in some conceivable event the renunciation might benefit a stranger could not in their Lordships' opinion invalidate the appointment even if the persons to perform the condition had been appointees.

In the Courts below the question of the validity of the appointment was a question of fact to be determined on evidence. On the evidence before them these Courts could come to no other conclusion than that the appointment was void as constituting a fraud on the power. Their Lordships, however, have to determine the question as a question of law independent of the evidence which was before the Courts below, and in their opinion the appointment was in all respects a good and valid appointment within the scope and intention of the power and cannot be impeached as constituting a fraud thereon.

Their Lordships will now proceed to consider the second question which arises for decision, namely, whether the contract of 18th August, 1886, whereby Mrs. Torkington and the two children of Henry Vatcher, junior, renounced their inheritance in the Jersey property in order that the marriage settlement funds might go in default of appointment, was induced by fraud and ought therefore to be set aside.

Henry Vatcher, Senior, died on 26th March, 1886, having by his will, dated 4th November, 1885, bequeathed to his wife the one-third of his personal estate of which by the law of Jersey he was entitled to dispose in addition to the one-third to which she was entitled by Jersey law; the remaining one-third devolved by Jersey law on his children or their issue. He appointed his wife and his son-in-law, Mr. Atkinson, to be his executors. He also signed prior to his death a document entitled "Expression of my wishes for the guidance of my family in the division of my property." By that document he expressed the wish that in the partake of his real property in Jersey of which by Jersey law he had no power to dispose, Margaret Torkington and the children of Henry Vatcher, junior, should renounce all claim thereto, stating as his reason that the property was uncertain and heavily incumbered and would be an everlasting and unprofitable incumbrance.

On the death of Mr. Vatcher, senior, Maria Florence Vatcher, the eldest daughter of Henry Vatcher, junior, became his principal heiress and as such entitled to take possession of his real estate in Jersey subject to the liability of dividing the same with her co-heirs, and of providing for the dower of the testator's widow and of her own mother. In this division her own share would by Jersey law be considerably greater than the share of any of the co-heirs including her sister Ellen. Their Lordships will assume that the inheritance consisted of all the items set out in the record, although it appears that as to the properties comprised in Schedule B they would not form part of the inheritance until the benefit of survivorship reserved to the widow of Henry Vatcher, senior, had been set aside in appropriate legal proceedings, and although as to the properties comprised in Schedules C and D they did not really

form part of the inheritance at all, the only right of the co-heirs being to have the price paid for them by Henry Vatcher, senior, brought into hotchpot in the division.

Shortly after the death of Henry Vatcher, senior, negotiations took place between his widow and second family on the one hand and Mrs. Torkington and the two children of Henry Vatcher, junior, on the other hand as to whether the latter should or should not renounce their shares in the inheritance, it being assumed by all parties, and in their Lordships' judgment rightly assumed, that if they did not do so the appointment of 22nd March, 1882, would stand, and they would therefore lose all interest in the settled funds. In these negotiations the widow of Henry Vatcher, senior, and his second family were represented by Mr. Coutanche, a Jersey lawyer of repute, and in part also by Mr. Atkinson, who had married a daughter of Henry Vatcher, senior by his second wife, and was a clergyman. Mrs. Torkington was represented by Mr. Baudains, another Jersey lawyer, and Mrs. Henry Vatcher, junior, and her two daughters, were represented by Mr. Graham, a solicitor practising at Fowey in Cornwall, assisted at times by Mr. Baudains. It is alleged that in the course of these negotiations Mr. Coutanche and Mr. Atkinson fraudulently represented to Mr. Graham that the properties mentioned in the statement to which their Lordships have already referred were, having regard to the incumbrances thereon, of no value at all, and by means of such representation induced Mr. Graham to advise his clients to renounce their inheritance.

These proceedings were instituted on 12th November, 1910, that is to say, twenty-four years after the alleged fraud. Mr. Coutanche, Mr. Atkinson, and Mr. Baudains who acted for the various parties concerned are all dead. The attitude which the Court ought to adopt in considering charges of fraud made under such circumstances is well stated by Bowen, L. J., in the case of *In re Postlethwaite* (4). The general presumption which the law makes is in favour of the good faith and validity of transactions which have long stood unchallenged, and if the known

facts and existing documents are, though such as to give rise to suspicion, nevertheless capable of a reasonable explanation, the Court ought not to draw inferences against the integrity of persons who have long been dead and cannot therefore defend themselves.

Approaching the question in this way, and after a careful consideration of the evidence, their Lordships have come to the conclusion that no fraud has been established on the part of any one. In order to establish fraud it must be proved first that a representation was made; secondly that this representation was untrue; thirdly that it was untrue to the knowledge of the person making it; and fourthly that it induced the contract. Under no one of these four heads is the evidence really satisfactory. (Their Lordships then considered the evidence in detail, and continued as follows):--

On the question of fraud, therefore, their Lordships cannot take the view adopted by the Courts below. It is true that as a general rule their Lordships' Board treat questions of fact on which there have been concurrent findings in the Courts below as conclusively established, but the present case is a peculiar one. In the first place their Lordships cannot help thinking that the evidence to the effect that the appointment of 22nd March, 1882, was a fraud on the power to some extent coloured the view taken by the Courts below of other facts. The appointment seems to have been considered as in the nature of an overt act in a fraudulent conspiracy to deprive the first family of their inheritance, which could not lawfully be done according to Jersey law, and other acts of Henry Vatcher senior, however innocent, are similarly treated. For example, the fact that, so far from paying off the incumbrances on the property, he actually created new incumbrances, and the fact that he took no means to divest himself of what he stated was an onerous property, are in the judgment cited against him. Again, there is in the present proceedings less reason than is usually the case for refusing to go behind concurrent findings. There was no oral evidence at the trial. All the evidence was taken on deposition, and the Courts below were in no better position to judge of its effect than is their Lordships' Board. And lastly, the res-

pondents' counsel did not himself rely on the rule, but expressly invited their Lordships to go into the evidence and come to their own conclusions. This their Lordships have done, and though they regret to differ from the Courts below, they cannot avoid some satisfaction in acquitting of all charges of fraud, persons who have long been dead and against whom in their life-time no such charge was ever made. Their Lordships cannot help thinking on reference to the initial stages of these proceedings that no charge of fraud was originally intended to be made. It appears to have been developed in the course of the examination and cross-examination of witnesses for the purpose of the trial. And though in the present case there is no reason, to suppose that the appellants were in any way taken by surprise or deprived of the opportunity of proving relevant facts, their Lordships are of opinion that where charges of fraud are intended to be made, full particulars thereof ought to be given in the pleadings, either as originally framed or as amended for that purpose.

The judgment stated that their Lordships expressed no opinion on the points that the respondent Maria Florence Paull, though of full age by Jersey law, was according to English law still an infant, and that the respondent Ellen Vatcher acted through Mr. Atkinson as her guardian, although his wife had an adverse interest.

Under the circumstances their Lordships will humbly advise His Majesty to allow the appeal and to dismiss the action. With regard to costs their Lordships observe that the appellants produced no evidence of English law in the Court of first instance, and under these circumstances they think that justice will be done if the respondents are ordered to pay the costs of this appeal and four-fifths only of the costs incurred in the Courts below, and will humbly advise His Majesty to that effect.

T. A. R.

Appeal allowed.

Solicitors for Appellants—Cameron, Kemm and Co.

Solicitors for Respondents—Powell and Skues.

A. I. R. 1914 Privy Council.

(FROM CANADA.)

28th January, 1914.

VISCOUNT HALDANE, L. C., LORD SHAW
OF DUNFERMLINE AND LORD
MOULTON.

David MacLaren and another—Appellants
v.

The Attorney-General for the Province of Quebec—Respondent.

On Appeal from the Supreme Court of Canada.

**** Riparian Rights**—*Land abutting on river or highway is presumed under English law to include land ad medium filum—Land described as being bounded by a certain river was held to abut on the river—Presumption applies in Canada—Deed—Construction.*

In construing the parcels in a document affecting land, say for example, a grant, the law treats the parties as describing the land of which the full use and enjoyment is to pass to the grantee. But in cases where the possession of the parcel so described would raise a presumption of ownership of the land in front of it *ad medium filum aquæ* or *viæ*, the law holds that it is the exclusion of that land which must be evidenced by the terms of the grant and not its inclusion and that if not evidenced, that land will be deemed to have been included in the grant, if the grantor had power to include it. Hence it is settled law that no description in words or by plan or by estimation of area is sufficient to rebut the presumption that land abutting on a high way or stream carries with it the land *ad medium filum* merely because the verbal or graphic description describes only the land that abuts on the highway or stream without indicating in any way that it includes land underneath that highway or stream.

[P. 194, C. 2.]

City of London Tax Commissioners v Central London Railway (1913) A. C. 364 Ref.

Where the land was shown as abutting on the river and was described as bounded by the river and again as bounded by a line following the windings and sinuosities of the river bank.

Held, that the description makes the land abut on the river and gives rise, according to English law, to the presumption above referred to.

[P. 194, C. 2.]

Where the dominant words in the description were that the land was bounded "on the east by the river Gatineau,"

Held, that it would require words in some other part of the grant plainly inconsistent with this to justify a construction being put on the grant which would make the land it covered, a parcel which was not bounded "on the east by the river Gatineau."

[P. 193, C. 1.]

Held, further that this language was emphasised by the other description of the boundary in the grant, which other description started from the post on the bank which marked the point where the land commenced to be bounded by the river Gatineau and proceeded as follows:—"Thence southerly along the said bank of the river Gatineau and following its sinuosities as it winds and turns."

[P. 193, C. 1.]

The application of the principle of *ad medium filum aquae* does not depend in any way on the nature or origin of the title of the grantor. Provided that the lands on the banks and bed of the river belong alike to the grantor and are alike alienable by him, the principle applies.

[P. 196, C. 1.]

There is no trace in Canadian law of any exception to the rule that the bed of a stream presumably belongs to the riparian owners except in the cases where that bed is in its nature public property incapable of being alienated and therefore such presumption of ownership cannot exist.

[P. 196, C. 1.]

**** (b) Riparian Rights—Rights of navigation and floating timber are independent of ownership of bed and are secured by statutory provisions in Quebec. Article 7349, Revised Statutes of Quebec 1906.**

The rights of the user of rivers for the purposes of navigation and the carriage of timber are independent of the ownership of the bed of the river and whatever be the source from which they originally came they are now protected by statutes in Quebec, which are very far reaching in their provisions.

[P. 194, C. 2.]

*** (c) Privy Council—Practice—Privy Council will not decide unnecessary point.**

It is more consonant with the practice of the Board to leave a question which on the view taken by their Lordships in a particular case, it is unnecessary to decide therein, to be dealt with in some case in which it is raised in a way which makes it essential to the decision of that case.

[P. 196, C. 2 & P. 197, C. 1.]

**** (d) Riparian Rights—"floatable river," meaning of—River floatable only for loose logs is not floatable within Art. 400, Civil Code of Lower Canada—Words. "Floatable river."**

Art. 400 of the Civil Code of Lower Canada provides *inter alia* that navigable and floatable rivers are the "dependencies of the crown domain."

Held, that the question whether a particular river comes within the words "navigable and floatable" is a mixture of fact and law.

[P. 197, C. 1.]

Held, further that a river floatable only for loose logs and not floatable for cribs or rafts is not "floatable" (case-law discussed).

[P. 199, C. 1.]

The river bed was irregular and it varied greatly in breadth so that in some places it was a wide river. The bulk of water that went down it in times of freshes was very large and at other times was comparatively small. Reaches in it might be navigated but they were comparatively short and it could not be said that they affected the economic use of the river, excepting strictly locally, just as the extension of any other river into a lake or the like, might give it a local usefulness.

[P. 197, C. 1.]

Held, that such a river is not navigable.
R. B. Finlay, Ayles, and Geoffrey Lawrence—for Appellants.

R. C. Smith, Buckmaster, and Hamar Greenwood—for Respondent.

Lord Moulton:—The appellants in the present appeal are David and Alexander

Maclaren, the plaintiffs in the original litigation, and the respondent is the Attorney-General of the Province of Quebec, who intervened in the suit under circumstances hereinafter mentioned, and, who, since such intervention, has substantially carried on the litigation on behalf of the Government of the Province. To make clear the points in dispute it will be necessary to set out somewhat in detail the facts of the case and the history of the litigation.

The river Gatineau is a river of considerable size but irregular bed, flowing into the river Ottawa on its north bank. Starting from the river Ottawa and proceeding up the river Gatineau one passes through the township of Hull, and then through the township of Wakefield. North of the township of Wakefield the river Gatineau has on its left or eastern bank the township of Denholm and on its right or western bank the township of Low. The documents creating these townships are Letters Patent issued by the Crown, in whom, of course, the property in the soil was originally vested, and such documents specify and define the boundaries of these townships.

By Letters Patent, dated 26th November, 1860, a portion of the township of Low, known as lot 39 of range 2 of that township, was granted to Caleb Brooks, and subsequently by Letters Patent dated 8th April, 1865, another portion, known as lot 38 of range 2 of that township, was also granted to him. Both these lots lie along the right bank of the river. By divers mesne assignments, the validity of which is not questioned, the plaintiffs have become the owners of seventeen acres of lot 39, and about four acres of lot 38, these portions being so situated that they may, for the purposes of this case, be taken to include so much of the lands comprised in lots 38 and 39 as lies along the river.

By Letters Patent, dated 24th March, 1891, the west half of a portion of the township of Denholm, known as lot 38 of range 1 of that township, was granted to William Brooks. The land so granted (which lies along the left bank of the river Gatineau) was, by a deed of sale, dated 4th May, 1894, sold by the said William Brooks to the plaintiffs. The validity of these transactions is not questioned.

It is not disputed, therefore, that the plaintiffs are the owners of lands on both sides of the river Gatineau, lying opposite to each other and so situated that, if the plots comprised in the grants are riparian lands, and if the ordinary presumptions of English law hold good, they would carry with them the ownership of the bed of the river lying between them. Whether these lands are riparian and whether these presumptions do hold good in the case of the river Gatineau are the two questions to be decided in the present case.

But these questions are raised in a very peculiar way, which necessitates the statement of certain further facts.

On 7th December, 1899, S. N. Parent, Commissioner of Lands, Forests, and Fisheries of the Province of Quebec, on behalf of the Government of that Province, sold to Edwin and William Hanson, the defendants in the Court below,

"the water lot and water power situate on the river Gatineau comprising all that portion of the bed of that river, covered by the 'Paugan Falls and Rapids', and the island and rock situate at the front thereof, and lying in front of lots 38, 39 and 40 of the second range of the township of Low, and of lots 38, 39 and 40 of the township of Denholm."

It is not disputed that this grant covers portions of the bed of the river Gatineau which would belong to the appellants if the two questions above mentioned are answered in their favour.

The litigation was commenced by the plaintiffs, who set up a title to these portions of the bed of the river based on the conveyance to them of the adjoining lands, and alleged that the defendants, Edwin and William Hanson (the above-mentioned purchasers from the Crown), had illegally, improperly, and without right entered on the property of the plaintiffs and had falsely claimed to be the owners thereof, and had offered the same for sale as such owners, and threatened and intended to re-enter and erect works thereon, and they prayed that the plaintiffs should be declared the owners of the property in question, and that the alleged sale by the Commissioner of Lands, Forests, and Fisheries to the defendants should be declared to be null and void and without effect in so far as it assumed to sell or to grant to the defendants any part of such property. They

further claimed an injunction and damages.

The defendants in their defence denied that any portion of the bed of the river belonged to the plaintiffs or had been included in the grants made to the plaintiffs' predecessors-in-title. Among other allegations of fact they set up that the river Gatineau is a navigable and floatable river whose bed formed part of the Crown domain, and that accordingly no part of such bed was included in the grants in question. This issue, as will presently be seen, has eventually become the main issue in the case.

Shortly before the plaintiffs put in their answer to the defendants' plea (which consisted substantially of a joinder of issue), the Attorney-General of the Province of Quebec intervened, as being interested in the event of the suit and entitled to be heard therein. As the grantor to the defendants, the Government of the Province was interested in defending the validity of its grant. Since this intervention the litigation has in substance been confined to the questions raised by the intervener, and it has been carried on between the plaintiffs on the one side and the Government, represented by the Attorney-General of Quebec, on the other. It is, therefore, not necessary to refer to the cross-demand of the defendants, or the claim for damages on the part of the plaintiffs, as the only point now before the Board is the question of title to the bed of the river.

The history of the litigation shews great differences of judicial opinion on the issues involved therein. Mr. Justice Champaigne, the Judge at the trial, decided in favour of the plaintiffs on all points. On appeal to the Court of King's Bench (Appeal Side) that Court (consisting of five judges) decided against the plaintiffs on all points. Appeal was then brought to the Supreme Court of Canada, and the six judges who heard the appeal were equally divided on the question of the plaintiffs' title, although on other points they agreed with the judgment of Champaigne, J. The appeal was accordingly dismissed, and it is from this decision of the Supreme Court of Canada that the present appeal is brought.

The case divides itself into two heads. In the first place, the respondent denies that the descriptions in the grants,

through or under which the plaintiffs hold, are such as would carry the bed of the river, even under English law. In the second place, he says that even if such were the case, it is not in accordance with the law of the Province to apply the English presumptions as to the ownership of the bed of a river or its inclusion in grants of the lands forming its banks to the case of a river such as the river Gatineau. In other words, he alleges that the river Gatineau is a navigable and floatable river, and that, by the law of Quebec, no portion of the bed of such a river goes with a grant of the land on its banks.

Excepting upon one point, there has been no dispute as to the facts of the case. At the trial the defendants sought to shew that the river Gatineau is navigable and floatable both to ships and rafts. The plaintiffs admitted that loose logs can be floated down it at certain times of the year, but they contended that it is not floatable otherwise than a *buches perdues*. After hearing evidence on both sides, the learned Judge at the trial found that (so far as is material to this case) the plaintiffs' contention was correct. His decision was reversed by the Judges of the Court of King's Bench, who decided (Carroll, J., dissenting) that the river was both navigable and floatable, but it is difficult to determine how far this reversal was due to their view of the law and how far to their view of the facts. On the appeal to the Supreme Court four out of six judges agreed with the conclusion of the judge at the trial on the facts, and the other two expressed no opinion thereon. Their Lordships agree with the view taken by the judge at the trial, by Mr. Justice Carroll in the Court of King's Bench, and by the majority of the judges of the Supreme Court, and hold that on the evidence the river Gatineau must be taken to be "*floatable a buches perdues*" only, and to be neither "navigable" nor "*floatable en trains ou radeaux*." Indeed the correctness of this view of the facts was hardly contested at the hearing of the appeal.

In order to decide the first point it is necessary to examine the documents of title under which the plaintiffs hold their lands. Taking first the history of the title of that portion of the plaintiffs' lands which lies on the right bank of the

river, we commence with Letters Patent, dated 1st December, 1859, creating the township of Low. These letters patent, after reciting that it is expedient to erect into a township a certain tract of waste land lying in the country of Ottawa proceed to describe that tract as follows:

"All that certain tract or parcel of land bounded and limited as follows, that is to say: On the north by the township of Aylwin; on the south partly by the township of Masham and partly by the township of Wakefield; on the east by the river Gatineau, and on the west partly by the township of Gawood and partly by the township of Aldfield; beginning at a post and stone boundary erected on the western bank of the river Gatineau aforesaid at the intersection of the north line of the township of Wakefield aforesaid and marking the south-east angle of the said tract or parcel of land; thence along the said north line of the township of Wakefield.....thence along the said south outline of the township of Aylwin astronomically east nine hundred and thirteen chains ninety-one links more or less to the intersection of the west bank of the river Gatineau aforesaid at a post and stone boundary, marking the south-east angle of the said township of Aylwin, and the north-east angle of the said tract or parcel of land; thence southerly along the said west bank of the river Gatineau and following its sinuosities as it winds and turns to the place of beginning. The said tract or parcel of land thus circumscribed.....has been further laid out and sub-divided.....into ranges and lots in the manner following...range first into 34 lots numbered from north to south, namely, from No. 1 to 34 inclusive, the same being broken lots and bounded towards the east individually and collectively by the river Gatineau aforesaid; range second into 56 lots numbered from north to south, namely, from No. 1 to 56 inclusive.....the whole as represented on the plan of the said tract or parcel of land hereunto annexed as near as the nature and circumstances of the case will permit, and in conformity to the actual survey in the field as returned and of record in the Crown Lands Department."

The actual plan referred to in these Letters Patent does not appear to have been put in at the trial by either party, but the plan which is now on record in the Public Department and which came into force on 20th January, 1902, was put in by the appellants at the trial, and no objection was taken to it (otherwise than that the document actually put in was a copy and not the original), and it has been freely referred to without objection at the hearing of this appeal, so that their Lordships conclude that it must have been taken by the parties as representing or reproducing the plan referred to in the Letters Patent. It accords exactly with the above description, and shews the

township as bounded on the east by the river Gatineau.

Whether the map or the verbal description of the parcels be taken as defining the land, their Lordships have no doubt that it was meant to be riparian. The dominant words in the description are that the land is bounded "on the east by the river Gatineau," and this is precisely what is represented on the map. It would require words in some other part of the Letters Patent plainly inconsistent with this to justify a construction being put on these Letters Patent which would make the land which they cover a parcel, which is not bounded "on the east by the river Gatineau." So far from any such words being present, the only other description, of the boundary agrees with and emphasizes this language. It starts from the post on the bank which marks the point where the township commences to be bounded by the river Gatineau and proceeds as follows: "Thence southerly along the said west bank of the river Gatineau, and following its sinuosities as it winds and turns." This is just such a description as one would give of the metes and bounds of a riparian property which was bounded by the river, and, in their Lordships' opinion, the use of this form of words in the detailed description of the boundaries of the township does not qualify in any way the simpler description that it is bounded "on the east by the river Gatineau."

The township of Low is, therefore, riparian, and from the position of the plaintiffs' land in the township, it follows that it also is riparian. But the fact that the portion of the plaintiffs' property which is situated in this township is riparian is made still more clear when we examine the grants under which it passed to their predecessors-in-title whether we take those grants by themselves or in conjunction with the above Letters Patent creating the township of Low. The Letters Patent granting lot No. 38 to the predecessor-in-title of the plaintiffs describe the parcel thus:—

"The lot number thirty-eight in the second range of the township of Low aforesaid; being a broken lot bounded in front to the east by the river Gatineau and to the west by the third range of the said township."

And the Letters Patent granting lot 39 adopt exactly the same phraseology. The Crown had undoubtedly the power

to make a grant of riparian land thus situated, and these two grants clearly grant it. This would suffice to decide the point, but it is to be noticed that each plot is spoken of as forming part of the township of Low, which shews that those acting for the Crown in making these grants interpreted the Letters Patent creating the township as including the land down to the river, which is the interpretation which their Lordships hold that they must bear.

The case as to the land of the plaintiffs which lies on the left bank of the river and is situated in the township of Denholm is substantially the same, but in this case the grant to the predecessor-in-title of the plaintiffs does not assist us. It merely describes the land granted as "the west half of the lot number thirty-eight in the first range of the aforesaid township of Denholm."

So that we are thrown back upon the Letters Patent creating that township in order to ascertain the position of the land thus granted. These Letters Patent are in the French language, but their purport is precisely the same as that of the letters patent creating the township of Low. The close correspondence may be judged from the following extracts which give the more material parts of the description of the lands included. The area is described as being "*delimitee et decrite comme suit.....au nord par le township de Hincks, au sud par le township de Wakefield, a l'est, partie par le township de Bowman et partie par le township de Portland et a l'ouest par la riviere Gatineau,*" and in going over the metes and bounds it says: "*De la, le long de la dite ligne exterieure sud du township de Hincks, plein ouest, six cent. quarante-quatre chaines, plus ou moins, jusqu'a la rive est de la riviere Gatineau, jusqu'a un poteau ou borne de pierre marquant l'angle sud-ouest du dit township de Hincks et l'angle nord-ouest de la dite etendue ou portion de terre. De la, le long de la rive est de la dite riviere Gatineau, dans une direction generalement sud-ouest et suivant ses sinuosites jusqu'au point de depart.*"

It will be seen that for all practical purposes the Letters Patent may be taken *mutatis mutandis* as mere translations the one of the other, so that the reasoning which has led their Lordships to the conclusion that the land of the plaintiffs in

the township of Low is riparian applies with equal force to their lands in the township of Denholm and it is not necessary here to repeat it.

In some of the judgments in the Courts below the learned Judges have held that the presumption that the bed of the river *ad medium filum aquae* was included in the grant is negatived by the fact that the metes and bounds of the parcels forming the townships as described in the Letters Patent make them terminate at the bank of the river. But their Lordships are of opinion that in so holding they are not giving full effect to the presumption or, (as it should rather be termed) rule of construction which is so well established in English law. It is precisely in the cases where the description of the parcel (whether in words or by plan) makes it terminate at the highway or stream and does not indicate that it goes further that the rule is needed. If there is any indication of the parcel going further there is no place for its operation. The application of the rule is strikingly illustrated in the latest case in which the point was considered in the House of Lords *City of London Land Tax Commissioners v. Central London Railway* (1). In that case the plots under consideration were described in language which undoubtedly represented them as plots terminating at the highway. In one instance the description was "Vacant ground formerly two houses and premises situate and known as Nos. 36 and 37, Newgate Street," and in another instance the description was "All those pieces of land now or formerly known as 85 and 86, Newgate Street,.....more particularly delineated and described on the plan hereto annexed marked A and thereon coloured pink," and on reference to that plan it was seen that the coloration stopped at the edge of the highway. Yet in all these instances their Lordships were unanimously of opinion that the rule ought to be applied, and that the lands up to the middle line of Newgate Street, were excluded in the certificates of redemption of land tax.

In construing the parcels in a document affecting land, say for example a grant, the law treats the parties as describing the land of which the full use and enjoyment is to pass to the grantee. But in

cases where the possession of the parcel so described would raise a presumption of ownership of the land in front of it *ad medium filum aquae* or *viae* the law holds that it is the exclusion of that land which must be evidenced by the terms of the grant not its inclusion, and that if not so evidenced that land will be deemed to have been included in the grant if the grantor had power to include it. Hence it is settled law that no description in words or by plan or by estimation of area is sufficient to rebut the presumption that land abutting on a highway or stream carries with it the land *ad medium filum* merely because the verbal or graphic description describes only the land that abuts on the highway or stream without indicating in any way that it includes land underneath that highway or stream. This is precisely what we have here. The land is shewn as abutting on the river and is described as bounded by the river, and again as bounded by a line following the windings and sinuosities of the river bank. This clearly makes it abut on the river and gives rise according to English law, to the presumption in question.

The first question, therefore, must be answered in the plaintiffs' favour. There remains the question whether the presumption of English law that the bed of the stream *ad medium filum aquae* belongs to the riparian proprietors holds good under the law of Quebec in the case of a river such as the river Gatineau.

Before examining this question, their Lordships think it desirable to deal with some matters which figured prominently in the argument and undoubtedly affected greatly the mode in which the case was presented to the Board, although they do not determine the issues in the case.

In the first place it was spoken of as though it gravely affected the rights of the public, and indeed as though the success of the appeal would close the river Gatineau to them. Their Lordships recognize the importance of the case, but they cannot agree that it involves any such consequences. The rights of user of rivers for the purposes of navigation and the carriage of timber are independent of the ownership of the bed of the river, and whatever be the source from which they originally came are now protected by statutes which are very far-reaching in their provisions. For instance, in the

(1) [1913] A. C. 364.

Revised Statutes of Quebec, , Article 7349 provides as follows :

" 2. It shall be lawful, nevertheless, to make use of any river or watercourse, lake, pond, ditch drain or stream, in which one or more persons are interested, and the banks thereof,.....for the conveyance of all kinds of lumber, and for the passage of all boats, ferries, and canoes subject to the charge of repairing, as soon as possible, all damages resulting from the exercise of such right and all fences, drains, or ditches damaged."

This is only one of many statutory provisions securing to the public the use of the rivers whatever be the private rights existing therein, and however this appeal be decided, these rights of the public will remain unaffected.

But this is not all. The rights of the public in the river Gatineau are not in any way put in issue in this case. The parties to this appeal are substantially at one on the question of the private ownership of the bed of the river Gatineau. The only difference between them is as to which of two private owners possesses it. The appellants contend that the portion of the bed of the river which is in question passed to their predecessors-in-title by the grants to Caleb Brooks in 1860 and 1865, and that to William Brooks in 1891. The respondent contends that it passed to the defendants under the grant to them in 1899. Neither party, therefore, sets up a title in the public. So far as the river Gatineau is concerned, the decision of this case will do no more than decide whether or not the language of certain existing grants was sufficient to pass particular portions of that bed, or whether, after such grants were made, they still remained in the hands of the Crown so that it had power to grant them by a later grant.

Nothing, indeed, could be more foreign to the contentions of either party than to deny that the bed of the river Gatineau has largely passed into private hands. It was admitted that the townships of Hull and Wakefield include the bed of the river so far as it flows through them. The plots in those townships are rectangular, so that in the case of river lots the bed of the river is included within the metes and bounds of the lots in question without any appeal to the doctrine of *ad medium filum aquae*. Counsel for the respondent emphatically disclaimed the doctrine that the Crown could not alien-

ate the river bed in precisely the same manner as any other public lands. But if this be the correct view of the law, we have here an example of a very simple case of the application of the presumption. A being absolute owner of the land on the banks and the bed of the stream grants to B. a plot bounded by the stream. In such a case it is established law that the conveyance is construed as passing also the bed of the stream *ad medium filum aquae*.

Notwithstanding the fact that the respondent admitted and indeed relied on the alienability of the river bed by the Crown the argument before this Board, as also the argument in the Courts below, turned largely on the provisions of Article 400 of the Civil Code of Lower Canada. This reads as follows:

"Roads and public ways maintained by the State, navigable and floatable rivers and streams and their banks, the sea-shore, lands reclaimed from the sea, ports, harbours and roadsteads, and generally all those portions of territory which do not constitute private property are considered as being the dependencies of the Crown domain."

As is the case with so many others, this article is taken almost unchanged from French sources, and, as is natural, the French text is the more helpful in arriving at the true interpretation. It reads as follows:

"*Les chemins et routes a la charge de l'Etat, les fleuves et rivières navigables et flottables et leurs rives, les rivages, lais et relais de la mer, les ports, les havres et les rades et genrealement toutes les portions de territoire qui ne tombent que dans le domaine privé, sont considérées comme des dépendances du domaine public.*"

The principal aim of counsel for the respondent in the argument before this Board was to establish that the river Gatineau was a floatable river in order to bring it within the operation of this article, and the efforts of counsel for the appellants were to shew that it was not a floatable river and that, therefore, this article did not apply to it.

It is this part of the case which has given to their Lordships the greatest difficulty and anxiety. The importance attached to it in the judgments that were delivered in the Courts below claims for it the most careful attention. Nevertheless their Lordships cannot but feel that the parties have not fully appreciated the bearing of this article on their respec-

tive contentions. If its meaning be that the beds of navigable and floatable rivers are in their nature incapable of constituting private property and necessarily remain public, a decision that the river Gatineau is floatable within the meaning of this article would be as fatal to the validity of the grant which the respondent seeks to defend as it would be to the grants on which the plaintiffs base their title. If, on the other hand, the article means only that the beds of navigable and floatable rivers initially form part of the Crown domain, but that they, like other public lands, are alienable and may form the subject of grants by the Crown, the article is well nigh immaterial in the present case. The application of the principle of *ad medium filum aquae* does not depend in any way on the nature or origin of the title of the grantor. Provided that the land on the banks and bed of the river belong alike to the grantor and are alike alienable by him the principle applies.

One further matter must be borne in mind. There is no trace in Canadian law of any exception to the rule that the bed of a stream presumably belongs to the riparian owners except in the cases where that bed is in its nature public property and therefore such presumption of ownership cannot exist. A perusal of the seigniorial decisions and the judgments of those who took part in them makes it clear that the exclusion of the beds of navigable and floatable rivers from the grants to seigniors was not by reason of express words in the grants nor of any special rule of law formulated *ad hoc*, but was a consequence flowing from the jurisprudence then existing derived from French sources under which the beds of such rivers were held to form part of the domaine public and thus to be incapable of becoming private property. But it followed that they were inalienable and this was fully recognised. They are always spoken of as *inalienables et imprescriptibles*. So much of that jurisprudence as remains is to be found in Article 400 of the Civil Code, and on the construction to be given to that article must depend the status of the beds of these rivers from the point of view of property.

The interpretation of Article 400 appears to their Lordships to be a ques-

tion of importance to the public so great that it can hardly be exaggerated. If it be the law that the beds of navigable and floatable rivers are public property incapable of being alienated, and that this principle has not been generally regarded in the actual Crown grants which have hitherto been made, the effect of a decision in the one way might have a widespread effect on the rights of individuals. On the other hand, a decision to the opposite effect must have a widespread effect on the rights of the public. In these circumstances their Lordships feel that it is desirable that a point of such importance should only be decided in some case in which the parties are respectively interested in the one and the other of the two rival interpretations so that there has been opportunity for full argument thereon. In the present appeal this has not been the case. Neither party was interested in supporting the interpretation that Article 400 means that the beds of navigable and floatable streams remain public property. Yet it is evident to their Lordships that this is a view of the article which cannot summarily be dismissed. The article clearly points to these lands standing in an exceptional position as contrasted with other lands. They are associated with specific types of land which are evidently intended to remain for all time the property of the State as contrasted with the individual, and the class is completed by the important category, "and generally all those portions of territory which do not constitute private property." In the face of all this it is impossible not to feel that there are great difficulties in accepting an interpretation which would leave them in the same position as to title and ownership as all other lands. On the other hand the proposition that the beds of these rivers, though of undoubted economic value, constitute a type of property which is vested in the Crown but which it cannot alienate presents very serious difficulties of another kind. It happens that the view which their Lordships take of the facts in this case renders it unnecessary that they should decide this point, and they, therefore, desire to make it plain that they express no opinion thereon, holding that it is more consonant with the practice of the Board to leave such a question to be dealt with in some case in

which it is raised in a way which makes it essential to the decision of the case.

There remains the important question whether the river Gatineau is a river which comes within the words "*navigable et flottable*." If this is answered in the negative, the river bed does not come within the provisions of Article 400 of the Civil Code, and it becomes unnecessary to consider the difficulties which that article presents.

This question is a mixture of fact and law. So far as fact is concerned the material for its decision consists mainly of the finding of the learned judge at the trial that the "river is floatable only for loose logs (*flottable a buches perdues*), and that it is not floatable for cribs or rafts (*flottable en trains ou radeaux*)," which their Lordships accept in its entirety. In addition to this there are, of course, certain facts as to the magnitude of the Gatineau, the nature of its bed, and of the flow of water in it at various periods of the year. On these matters there is no dispute between the parties. The river bed is irregular and it varies greatly in breadth, so that in some places it is a wide river. The bulk of water that goes down it in times of freshet is very large, and at other times is comparatively small. Reaches in it may be navigated, but they are comparatively short, and it cannot be said that they affect the economic use of the river, excepting strictly locally, just as the extension of any other river into a lake, or the like, might give it a local usefulness.

That such a river is not navigable is evident, and it was indeed practically conceded by the respondent's counsel in the argument before us. The contest raged round the word "*flottable*," and a great wealth of legal knowledge and research was displayed on both sides, and a mass of material of very unequal value bearing upon it was placed before their Lordships. The outcome seems to them to be as follows: It is abundantly clear that the distinction between the legal status of the beds of streams which were "*navigable et flottable*" and the beds of other streams existed in French jurisprudence long prior to the compilation of the Code Napoleon. The former belonged to the domaine public, while the latter belonged to the riparian owners *ad medium*

filum aquae. Accordingly, when the Code Napoleon was compiled the law in this respect was expressed in Article 538 in language identical with that which is now found in Article 400 of the Civil Code of Quebec. But although the law was thus authoritatively formulated there was great diversity of opinion as to its meaning. One school of lawyers insisted that streams that were only *flottables a buches perdues* were within the article and others denied it. On the whole, the balance of authority was greatly in favour of the latter, and in 1823 the Court of Cession gave a decision in that sense. But even this did not settle the matter, and conflicting decisions were given in the different Courts. At length, in 1898, the Legislature put an end to the confusion by passing a law that streams should not be considered *flottables* if they were only *flottables a buches perdues*, and, speaking generally, the authorities treat this as being a declaration of the law in accordance with the better opinion prevailing at the time. All this legal history, although interesting, can have no substantial bearing on the present case. The connection between Canadian law and French Law dates from a time earlier than the compilation of the Code Napoleon and neither its text nor the legal decisions thereon can bind Canadian Courts or even affect directly the duty of Canadian tribunals in interpreting their own law. Still less can it be suggested that the decision of the French Government to end disputes by a statute can have any weight in the matter. The only conclusion that can legitimately be drawn from the above chapter of French legal history is that the meaning of the word "*flottable*" was very uncertain in French jurisprudence at the critical date when French law became recognised as the basis of the law of the Colony of Lower Canada, but that there was certainly no consensus of opinion that a river was floatable in a legal sense if it was only floatable *a buches perdues* in fact.

Nor, in their Lordships' opinion, is much light to be derived from the decisions during the period between 1791 and the extinction of the feudal rights in Lower Canada in 1854. Judging from the material presented to their Lordships in the argument, there seems to be no very settled jurisprudence, and no doubt many

questions remained in a state of uncertainty. The case of *Oliva v. Boissonnault* (2), in 1833, is of value from this point of view. We there find the judges of first instance treating "floatable" as equivalent to "capable of floating logs or rafts." But the Court of Appeal doubted the correctness of this view, and Reid, C. J., in giving the judgment of the Court, indicates that in their opinion "floatable" was not applicable to a river which could only float logs. They evidently inclined to the view that "floatable" as applied to a river implied that it was ranked among navigable rivers "*portant bateaux et radeaux pour le transport du bois et autres marchandises*," a view which, as will presently appear has subsequently received the support of high authority. But, speaking generally, no substantial help is obtained until we come to the inquiry which took place under the authority of the Seigniorial Act of 1854.

By that Act certain Commissioners were appointed to settle the value of the seigniorial rights which were about to be abolished, and for that purpose to draw up schedules of such rights in each case. In order to settle the numerous legal questions which must necessarily arise in the performance of their duties, the judges of the Court of Queen's Bench and the Superior Court for Lower Canada were erected into a tribunal to decide such questions, and the Attorney-General and the parties interested were entitled to appear before that tribunal and submit questions to it for decision. They might also submit their own views as to what the answers ought to be in the shape of legal propositions which they asked the Court to declare to be the answers to the questions put. After thus hearing the rival contentions, the Court had to decide what was the proper answer. In this way a body of decisions of the highest authority as to the law then prevailing in Lower Canada was collected, to which an almost authoritative sanction has been given by statute, and which, apart from statute, naturally command the highest respect by reason of the composition of the tribunal which pronounced them.

Turning to these seigniorial decisions, and the judgments of the individual judges which accompany them, one can-

not find any specific reference to the status of the beds of rivers which were only "*floatables a buches perdues*." But on the other hand, one finds clear statements that the seigniors became by their grant proprietors of the non-navigable rivers which passed through the fief subject to legal servitudes, and to the *ad medium filum* rule. Some of the judges used single term "non-navigable" and some (among whom is Sir Louis Lafontaine, C. J.) used the more exact phrase "*non-navigable et non-floatable*." But a perusal of these able and exhaustive judgments makes it abundantly clear that this difference of phraseology does not indicate any difference of opinion. Indeed, the agreement between the members of the tribunal on important questions is very striking. In truth "non-floatable" was looked upon as a special form of "non-navigable" and the word was evidently put in by those who used it for the purpose of preventing its being thought that the only form of navigation contemplated was by ships (*naves*). The word "floatable" therefore, referred to navigation by cribs or rafts (*en trains ou radeaux*). In this connection the judgment of Mr. Justice Day (Seign. Quest. B. 51 e) is instructive. After using the single term "navigable" throughout he says: "*Ces observations s'appliquent également aux rivières floatables propres au transport des objets de commerce*." Even if their Lordships had to rely alone on these seigniorial decisions they would come to the conclusion that the Courts that pronounced them were of opinion that a river that was utilizable only by floatation "*a buches perdues*" was not navigable or floatable, and that its bed was the subject of private property.

But on this point their Lordships are not left to mere inference. In the year 1859 the case of *Boswell v. Denis* (3) came before a Court presided over by Chief Justice Sir Louis Lafontaine, who took a leading part in deciding the seigniorial questions. This was only three years after the decision of the seigniorial questions, and it related to a river as to which the judge at the trial reported "that the proof clearly established that the river was neither floatable nor navigable but that it was merely floatable *a buches*

(2) Stuart's Lower Can. Rep. 524.

(3) 10 Lower Can. Rep. 294.

perdeus." This being the finding in fact the Chief Justice says in his judgment that it had been already proved that the river was neither navigable nor floatable and that, according to the decision of the Seigniorial Court, such rivers were held to belong to the riparian proprietors. Four other members of the Court had also been members of the Seigniorial Tribunal, and though one of them dissented, it was apparently on the effect of the evidence and not on the point of law. Their Lordships consider that this decision justifies them in regarding the answers to the seigniorial questions as meaning that rivers were not floatable in the legal sense of the term if they were only so *a buches perdeus*.

Finally, this precise question came on appeal before the Supreme Court of Canada, in the year 1908, in the case of *Tanguay v. Canadian Electric Light Co.*, (4). Very learned judgments were pronounced in that case, indicating a wide difference of opinion among its members, but the Court, by a majority consisting of the Chief Justice and Davies, McLennan, and Duff, JJ. (Girouard and Idington, JJ. dissenting), decided that rivers which were only floatables *a buches perdeus* were not "floatables" in the legal sense of the word, and, therefore, did not come within Article 400 of the Code. Their Lordships are of opinion that this decision was right. The elaborate reasoning which is to be found in the judgment of the Chief Justice in this case (with which their Lordships agree) renders it unnecessary to go more in detail into this question.

No doubt there are to be found decisions to the contrary in some of the Courts during the period between 1854 and the decision of the case of *Tanguay v. Canadian Electric Light Co.* (4) in the Supreme Court. But these decisions are of inferior authority and it will be found on examination that the real question in issue in those cases was not the ownership of the bed of the river, but the rights of the public to use the river for commerce, which is a different question depending on wholly different principles.

It follows, therefore, that the river Gatineau, so far as is material to this case, does not come within Article 400 of the

Code, and consequently it is not necessary to construe that article. It also follows that, inasmuch as their Lordships are of opinion that the grants under which the plaintiffs hold fully establish their title to those portions of the bed of the river which are in issue, judgment ought to have been given for the appellants in the Court below. Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed. The orders of the Supreme Court and the Court of King's Bench will accordingly be set aside, and the judgment of Champaigne, J. restored. The respondent will pay the costs of the appellants in all the appeal proceedings, including the appeal to this Board.

T. A. & S. A. R. *Appeal allowed.*

Solicitors for Appellants—Norton, Rose, Barrington and Co.

Solicitors for Respondent—Charles Russell and Co.

**** A. I. R. 1914 Privy Council.** (FROM QUEBEC.)

3rd February, 1914.

LORDS DUNEDIN, ATKINSON AND
LORD SHAW OF DUNFERMLINE.

Cedars Rapids Manufacturing and Power Company—Appellants

v.

Locoste and others—Respondents.

On Appeal from the Superior Court of Quebec.

**** Land Acquisition award of compensation—Principles on which it is to be awarded in Canada—Same as in the law of England—The value to be paid for is the value to the owner as it existed at the date of taking, not the value to the taker—The value of the owner consists in all advantages present or future the land possesses but it is the present value alone of such advantages that falls to be determined.**

The appellants were a company incorporated by a statute of the Parliament of Canada in 1904 empowered to construct and develop water powers in or adjacent to the river of St. Lawrence, and to take by way of expropriation lands actually required for such development. With a view to such development the appellants served notices of expropriation of some of the respondents' lands. Regarding the principles on which compensation for land taken is to be awarded it was held that the law of Canada as regards the principles upon which compensation for land taken is to be awarded was the same as the law of England. Two propositions might be stated:—

(1) The value to be paid for is the value to the owner as it existed at the date of the taking, not

the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that he is entitled to.

While, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking, the value is not a proportional part of the assumed value of the whole undertaking, but is nearly the price, enhanced above the bare value of the ground which possibly intended undertakers would give. That price must be tested by the imaginary market which would have ruled, had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realised possibility.

The real question to be investigated is, for what would these three subjects have been sold, had they been put up to auction without the appellant company being in existence, with its acquired powers, but with the possibility of that or any other company coming into existence and obtaining powers. *In re Lucas and Chesterfield Gas and Water Board* (1909) 1 K. B. 16 applied.

R. Finlay, Mignault and Geoffrey Lawrence—for Appellants.

E. Clarke, Macmaster, A. Lacoste and A. Lacoste—for Respondents.

Lord Dunedin:—The appellants are a company incorporated by a statute of the Parliament of Canada in 1904, empowered to construct and develop water powers in or adjacent to the river St. Lawrence in the parish of St. Joseph of Soulanges in the Province of Quebec, and to take by way of expropriation lands within the parish actually required for such development.

With a view to such development the appellants served notices of expropriation on the respondents, who, as executors of the estate de Beaujeu, were proprietors of the subjects to which such notices applied. These subjects were three in number to wit, (1) the Ile aux Vaches; (2) the Ile Bedard, and (3) reserved rights over the Pointe du Moulin: For these subjects the appellants by the said notices offered to pay respectively \$2,800, \$. 200, and \$1700, and named an arbitrator in the event of these sums not being accepted. The respondents did not accept these sums, and named on their part an arbitrator. The third arbitrator, or umpire, was named according to law by the judge of the Superior Court.

The three arbitrators after visiting the properties heard witnesses and received documents, and finally, by a majority,

consisting of the arbitrator appointed by the appellants and the arbitrator appointed by the Judge of the Superior Court, awarded as compensation the sums offered by the appellants. The third arbitrator appointed by the respondents dissented, and intimated that he would have been prepared to award the sums of \$62,000, \$. 34,000, and \$80,000 respectively.

Against the findings (1) and (3), *i.e.*, for \$2,800 for the Ile aux Vaches and \$1,700 for the reserved rights at Pointe du Moulin, there lay, under the Canadian law, an appeal on the merits to the Superior Court of Quebec; and an appeal was taken by the respondents.

Against finding (2), owing to the award being less than \$600, no appeal lay. But a direct action in the Superior Court, to set aside the award *in toto*, was brought by the respondents. The appeals and the direct action were heard together before Chief Justice Davidson of the Superior Court. He allowed the appeals and substituted for the sums awarded the sums proposed to be awarded by the dissenting arbitrator. In the case of the Ile Bedard he set aside the award and directed a new arbitration. From these decisions the present appeal is brought by special leave to this Board. It now becomes necessary to describe generally the subjects taken.

The Ile aux Vaches is an island situated to the north of the *medium filum* of the St. Lawrence River, at a point about forty miles above Montreal, of the extent of 28½ arpents—an arpent representing slightly more than one acre. Ile Bedard is a smaller island also to the north of the *medium filum*, having an area of 3½ arpents, and situate 7600 feet down the river from the Ile aux Vaches. Further down again, and 700 feet from the Ile Bedard, comes the Pointe du Moulin, which is a point jutting out into the river to such an extent that approximately a straight line drawn from the southern side of the Ile aux Vaches through the Ile Bedard will cut the point in question. The whole of the riverine land at the Pointe du Moulin originally belonged to the respondents' predecessors. They have sold all the lands at the Pointe du Moulin subject to a reservation in the following terms:—

“*Le vendeur, es qualite, se reserve*
—1°. *Un chemin de vingt quatre pieds*

de largeur sur toute la profondeur du susdit terrain depuis le chemin de la Reine jusqu'au Fleuve St. Laurent 2°. Un emplacement sur la susdite terre suffisamment grand pour la construction d'un moulin, d'une manufacture ou de toutes autres batisses propres a des fins industrielles. Ces deux reserves sont faites a perpetuite et l'acquéreur, ses hoirs et ayants cause seront obliges de payer toutes taxes municipales ou scolaires qui a l'avenir seront imposes sur les terrains ci-dessus reserves, sans porvoir pretendra a aucune indemnité ou compensation. Le vendeur es qualite aura le droit de prendre possession des reserves susmentionnees quand il le jugera a propos, et, de plus, il se reserve tous les debris de l'ancien moulin et le droit de les enlever en aucun temps sans que son passage a cet effet sur la terre susvendue soit considere comme l'ouverture de l'exercice de la reserve en premier lieu mentionnee d'un chemin, &c., &c., &c. L'acquéreur, ses hoirs et ayants cause n'auront aucunement le droit de se servir des pouvoirs d'eau qui se trouvent sur le bord de la greve du St. Laurent dans le voisinage de la terre susvendue ou sur icelle, le vendeur es qualite, en faisant, par les presentes, une reserve expresse."

The river being a navigable river, the bed belongs, according to the law of Canada, to the Crown, and no riparian owner can construct works in the bed without the consent of the Crown.

The river at this place is in rapid. The total fall measured from the top of the Ile aux Vaches down to the lowest point of the Pointe du Moulin is about 28 feet. The scheme of the appellants' works is to construct a dyke in the bed of the river from Ile aux Vaches to Ile Bedard and then on to the lowest point of the Pointe du Moulin. That will impound the whole-waters of the river to the north of the dyke. To be able to do this they obtained, by agreement with the Dominion Government, a right to erect the works and to abstract the water. They further propose to submerge, by cutting away, all jutting-out portions of the Pointe du Moulin till the last jutting-out piece, on which they propose to erect their power station, thus providing for an uninterrupted flow of the river towards their powerhouse and availing themselves of the total fall of 28 feet.

The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the

law of England, and it has been explained in numerous cases, nowhere with greater precision than in the case of *Lucas and Chesterfield Gas and Water Board In re* (1), where Vaughan Williams and Fletcher Moulton, L. JJ. deal with the whole subject exhaustively and accurately.

For the present purpose it may be sufficient to state two brief propositions:—(1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability, as pointed out by Fletcher Moulton, L. J. in the case cited, is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realised possibility.

Applying these principles, it is in the opinion of their Lordships impossible to support the judgment appealed against. The greater part of the judgment of the learned Chief Justice is concerned with demonstrating that the arbitrators in the award which they had given had gone on evidence which went to agricultural value alone (using that term as including the water power of the mill used as an ordinary mill). In this criticism so far their Lordships think, the learned Chief Justice was right. But when he comes to fix the value to be substituted for that given by the majority of the arbitrators he accepts the figures given by the dissenting arbitrator and confessedly bases them on the evidence given by the wit-

(1) [1909] 1 K. B. 16.

nesses for the respondents (appellants before him).

Their Lordships have sought in vain in this testimony for any evidence directed to the true question as they have expressed it above. All the testimony is based on the fallacy that the value to the owner is a proportional part of the value of the realised undertaking as it exists in the hands of the undertaker. There are other fallacies as well, but that is the leading one, and is sufficient utterly to vitiate their testimony.

It would be tedious to quote too much of the evidence, but the following may be taken as samples:—

Exhibit A-10 is a report from Isham Randolph, Engineer. He was examined as a witness, and his evidence is really only a development and amplification of his report. His qualifications as an engineer are undoubted, and his opinion on engineering matters worthy of the greatest respect. But you need not go any further than the first sentence to see how completely he has misunderstood the legal position:—

"I consider that as component parts of a hydro-electric power development having head works at Ile aux Vaches and power plant on the point indicated the said Ile aux Vaches and the said point of land have very great value, and should make the owners participants in the earnings of the development, or else they should receive in advance a compensation based approximately upon the net earnings of the power development in the ratio of the head controlled by these two properties to the total head capable of being developed."

Arthur Surveyer, another engineering witness, deals separately with the different subjects. As to the Ile aux Vaches, he deals with it thus:—*First*, he says, if the island were not there and there were shoal water, it would cost \$39,000 to build a dam, which would represent part of the island. *Secondly*, when that was done there would be a loss of 1·7 foot of head, as compared with the present works, which would mean a loss to the company of an annual rent of \$1,050, which, capitalized at 5 per cent., comes to \$21,000. *Thirdly*, he says, the protective value of the island to the works below it is absolute. To ensure the same result, if the island were not there, by means of an insurance, you would have to pay underwriters a premium, which, capitalized, amounts to \$.17,000; and, *fourthly*, he estimates that the smooth water below it,

which the presence of the Ile aux Vaches insures, amounts to a saving during the construction of the works below it of 6,000. Adding these sums together, he puts the value of the Ile aux Vaches at \$83,000.

It is difficult to conceive evidence more honey-combed by fallacy than this. Besides the general fallacy already mentioned, it appropriates to an island the proprietorship of which carries with it no rights over the bed of the river, and no connection with the property on the bank opposite it, the whole value of the "head" of water which is *ex adverso* of it. It measures the value of the island by the cost of an *opus manufactum*, which might be made if the island was not there; and, *lastly*, it values both temporarily and permanently "protective" action of the island, totally forgetful that the works might be stopped one foot short of the island, no part of the island taken, and yet the protective value would be there all the same.

Dealing with the reserved rights at the Point, he bases his calculation on loss of profits to the taking company, and also forgets that the power to cut away the protruding parts of the other portions of the Point, which alone makes possible the unrestricted flow, is a power that flows from the Government contract and the taking of the riparian lands, and has nothing to do with the reserved water rights of these claimants.

Mr. Robertson, another engineer, when asked as to the Ile aux Vaches, gave the following evidence: "Q.—You were valuing it at the value it would possess for the Cedars Rapids Manufacturing Company? A.—Yes, that in my opinion would be the value to them."

Further quotation is unnecessary. All the witnesses persist in looking at the three subjects as forming parts of a completed whole and they estimate their value as proportional parts of that whole, whose value they calculate by what it will bring in by way of profit to the undertakers. Their Lordships may quote the words of Vaughan Williams, L. J., in the case cited as applicable to this case:

"The element which the arbitrator may take into consideration is not the fact that the land has in fact been taken, and that the probability (*i. e.*, of purchasers requiring the land for such purposes) has been realised by the promoters having

obtained compulsory powers to take the land in question, but only the value of the probability as it existed before the promoters had obtained their powers.....it appears that the umpire has treated the probability and the realized probability as identical for the purposes of valuation, he has gone on a wrong basis, and we ought to send the award back to him."

Indeed, the mistake goes further in this case even than in that. For in that case there was only one subject: Here there are three subjects detached, and the value which the witnesses attribute to them is only reached by joining them up, a process which depends on powers obtained not from the claimants, and for the enhanced value of which result the claimants have no right to be compensated.

The real question to be investigated was, for what would these three subjects have been sold, had they been put up to auction without the appellants the Cedars Power Company being in existence with its acquired powers, but with the possibility of that or any other company coming into existence and obtaining powers.

It is on account of the latter consideration that their Lordships, while unable to accept the judgment under appeal, are also unable to restore the judgment of the arbitrators. Unfortunately, the appellants led no evidence except as to their agricultural value. Now, with regard to the Ile aux Vaches and the reserved water rights, it seems possible that there may be some value over and above the bare value. If the situation be naturally favourable to the establishment of power works like those of the appellants, then it is possible that the respondents and others might have been prepared to offer an enhanced value on this account, taking the chances of a situation in which they might or might not obtain the requisite parliamentary powers to work out a commercial scheme. But the value emerging through a grant of such powers having been actually given cannot after the event be taken into account. Also with regard to the reserved water rights there must be no confusion made. It is not that the water power of the appellants will be derived from the reserved water rights; but it is that a water power like that of the appellants could not be developed and located to such advantage without extinguishing the reserved water rights of the respondents. These considerations, however, point to

the possibility of something more being given for the subjects than the bare value; or in other words, that if they had been put up to auction as beforesaid, there was a probability of a purchaser who was looking out for special advantages being content to give this enhanced value in the hope that he would get the other powers and acquire the other rights which were necessary for a realized scheme.

As regards the Ile Bedard the Board is, however, satisfied that, on the materials placed before them the arbitrators' conclusion was reasonable and that the case as now presented does not leave any substantial ground for thinking that any enhancement for the possible reasons indicated would occur. This case accordingly ought to be ended now.

Their Lordships will therefore advise His Majesty to direct that with regard to the Ile Bedard the judgment complained of be reversed with costs in the Court below to the appellants the Cedars Rapids Company; and secondly that with regard to the Ile aux Vaches and the reserved power and mill site the judgment complained of be set aside and the Court directed to remit the matter to the arbitrators to hear evidence and make an award in accordance with the principles herein set forth: no costs being allowed to either party in the arbitration already held or in the Court below; and further, that neither party ought to have costs before this Board.

T. S. N.

Case remanded.

Solicitors for Appellant—Lawrence Jones and Co.

Solicitors for Respondents—Blake and Redden.

**** A. I. R. 1914 Privy Council.**

(FROM NEW ZEALAND).

19th March, 1914.

LORDS DUNEDIN, PARKER OF
WADDINGTON, SUMNER AND
PARMOOR.

*Equitable Life Assurance Society of the
United States*—Appellant

v.

Reed—Respondent.

On Appeal from the Court of Appeal of
New Zealand.

Insurance (Life)—Endowment policy—Non-payment of premium—Assurer covenanting to grant the assured a paid up endowment or in lieu thereof certain cash value, as per the Table of Loans and Surrender values attached to the contract of Insurance—Life Insurance Act 1908 of New Zealand (Secs. 63 and 64) has no application to this kind of Endowment policy.

One of the privileges attached to the Endowment policy of the respondent was as follows:—"This policy shall lapse, and together with all premiums paid thereon shall forfeit to the Society on the non-payment of any premium when due except that provided premiums shall have been paid for one of the periods respectively mentioned in the following table; there will be granted without action on the part of the assured a paid up endowment for the amount fixed in the said table; or in lieu thereof at the option of the assured, the cash value fixed in the said table will be paid to the said assured upon the due surrender of this policy to the Society." And Section 64 of the Insurance Act of 1908 provided "No policy shall become void by non-payment of premium so long as the premiums and interest in arrear are not in excess of the surrender value as declared by the company issuing the same in the answer of such company given to the tenth question of the Seventh Schedule hereto." The respondent had paid premia for 5 years and then defaulted. She was as per the table of loans and surrender values, entitled to a paid up policy of £200. In an action by her for the policy (paid up) of £200, the appellant pleaded that Section 64 of the Insurance Act compelled them to treat "the policy as still existing in the form of the original endowment policy, until the cash value was eaten up in accordance with Section 63 by the premiums necessarily becoming due and remaining unpaid after which no further obligation remained on their part."

Held, that Section 64 intended to lay down a rule of Public policy and that it is impossible for either the assured or an assurer to contract himself out of it or to waive its effect. The section only prohibits; it does not enjoin. And it does not apply to this case because the Society does not by the policy contract to pay any cash surrender value. The thing which the Society covenants to give is not cash, nor is it given in consideration of the assured relieving the Society from any liability under the policy. It is a fully paid endowment to be given if and when the Society's obligation to pay the endowment amount under the policy has come to an end by reason of the non-payment of the premiums. What is called the loan or cash value in the column with that heading is not a payment which the Society makes to buy off the liability dependent on the continuance of the premiums paid that is already gone, but a payment to get off the liability under the paid up endowment. [P. 205 & 206, C. 2 & 207, C.1.]

P. O. Lawrence and Northcote—for Appellants.

W. F. Hamilton and H. S. Preston—for Respondent.

Lord Dunedin:—The only question argued in this appeal was the effect of the 63rd and 64th sections of the Life

Insurance Act, 1908, of New Zealand on the policy issued by the appellants to the respondent. Any argument, if such existed, based upon the conduct of the parties was waived.

The policy in question was what is generally known as an endowment policy. In return for the payment of £20 12s. 6d. as a premium paid each half-year for twenty-five years, the appellant agreed to pay to the respondent's executors the sum of £1,000 if death should take place before the expiration of the twenty-five years, and the like sum of £1,000 to the respondent herself if she should survive that period. It is specially set out that the privileges and conditions set out in the third and fourth pages of the instrument shall form part of the contract.

The question arises on the seventh privilege or condition. It is headed "Loans and Surrender Values," and it is in the following terms:—

"VII. Loans and Surrender Values.

"After this policy has been in force three years the society will make loans thereon at five per cent. interest per annum, payable in advance, of the respective amounts stated in the following table, upon the due assignment of this policy to the society as collateral security for such loan.

"This policy shall lapse and together with all premiums paid thereon shall forfeit to the society on the non-payment of any premium when due, except that provided premiums shall have been paid for one of the periods respectively mentioned in the following table, there will be granted, without action on the part of the assured, a paid-up endowment for the amount fixed in the said table; for in lieu thereof, at the option of the assured, (1) the cash value fixed in the said table will be paid to said assured upon the due surrender of this policy to the society at any time after its termination; or (2) (provided this policy is surrendered within the days of grace, or, with satisfactory evidence of good health, within one year thereafter) a paid-up term policy for the full amount assured under this policy, and if the assured is living at the expiration of the said term policy, the pure endowment indicated in the table will be paid in cash to the said assured. The paid-up assurance, cash value and paid-up term policy referred to herein, are based on the number of full year's premiums that have been paid, are granted without participation in profits, and are subject to reduction for any indebtedness to the society under this contract. In consideration of the premises it is understood and agreed that all right or claim for non-forfeiture or surrender value other than that provided in this contract is hereby waived and relinquished, whether required by the statutes of any country or State or not."

Then there is added a table of loans and surrender values as follows:—

Table of Loans, and of Surrender Values
Either in Cash, Paid-up Endowment,
or Extended Assurance, in accordance

with the Provisions of Section VII
above.

At the end of.	Loan or Cash Values.			Paid-up Endowment, granted auto- matically, unless other Settlement selected.			Extended Term Assurance for Face of Policy, from date of Non-payment of Premium.				
							Assurance extended for.		Cash (Pure Endowment) paya- ble to Assured, if living, at Expira- tion of Extended Assurance.		
Years.	£	s.	d.	£	s.	d.	Years.	Months.	£	s.	d.
3	47	0	0	120	0	0	7	7			
4	74	0	0	160	0	0	12	2			
5	107	0	0	200	0	0	16	8			
6	131	0	0	240	0	0	19	0	24	0	0
*			*	*			*	*	*		
20	719	0	0	800	0	0	5	0	787	0	0

The respondent paid the stipulated premiums for five years and then ceased to pay. She claims that, in terms of the contract made, that she is entitled to a paid-up endowment of £ 200. The appellants do not dispute that this is in accordance with the terms of the contract, but say that, their attention having been called to Section 64 of the Act of 1908, they could not fulfil their promise, but were bound to consider the policy as still existing in the form of an endowment policy of £ 1,000, until the cash value of £ 107, was eaten up in accordance with Section 63 by the premiums necessarily becoming due, and remaining unpaid, after which no further obligation remained on their part.

An originating summons was taken out by the respondent under the Declaratory Judgments Act, 1908, wherein five questions were put to the Court. Their Lordships will advert to the answers later. For the present it is enough to say that the Court of Appeal, by a majority of four to one, upheld the contention of the respondent, and found her entitled to a paid-up endowment of £ 200.

The question turns on the meaning and effect of Section 64 of the Insurance Act of 1908. That section is as follows:—

"No policy shall become void by non-payment of premium so long as the premiums and interest in arrear are not in excess of the surrender value as declared by the company issuing the same in

the answer of such company given to the tenth question of the Seventh Schedule hereto."

Section 64 is the first of a fasciculus of sections headed "Protection of Policies." The other sections which end with Section 66 are concerned with the protection of policies from the effects of bankruptcy and the securing that the proceeds of a policy at death shall pass to the representatives of the deceased.

Their Lordships have no doubt that this is a section intended to lay down a rule of public policy, and that it is impossible for either an assured or an assurer to contract himself out of it or to waive its effect. They cannot, therefore, agree with the answers given by the majority of the Court to the questions 4 and 5 as put.

Taking then, the section as an injunction which cannot be disregarded, what is its meaning? In all cases where something not *ipsa natura* unlawful is prohibited by statute, the words of prohibition must be taken as they stand; they must not be amplified in order to meet a supposed evil, or restricted in order to protect a natural freedom. In other words, the evil that was to be checked can only be considered so far as necessary for the interpretation of the words, but must not be used for an independent determination of the scope of the remedy. Now it will be observed, first, that the section is in a negative form it prohibits, it does not enjoin. And it cannot, in their

Lordships' opinion, by turned into a mandatory section by combining it with the provisions of Section 63, as is done in part of the argument used by Mr. Justice Edwards in the Court below.

Secondly, the only thing struck at is the becoming void of a policy in respect of the non-payment of a premium. This prohibition is universal, *i.e.*, it is equally directed against a special stipulation to that effect and against the common law result in mutual contracts falling within the section when one party fails to perform his part of the bargain or when the liability of one party is expressed to be conditional on the other party performing his part of the bargain. What, then, is the meaning of the term "void"? The word is used in a business sense common in speaking of insurances and not with any legal technicality in the sense of avoidance *ab initio*. The meaning here is that the Company is not to be relieved from his liabilities under the policy by reason of non-payment of premiums. Any clause in a policy which would have this result would be struck at and made non-effective by the statute. It is, however, next to be observed that the prohibition is not absolute, but is conditioned by the words "so long as the premiums and interest thereon in arrear are not in excess of the surrender value as declared by the company issuing the same in the answer of such company given to the tenth question of the Seventh Schedule hereto." This refers us to the Seventh Schedule to find out in each case what is the surrender value spoken of in Section 64.

The Seventh Schedule is a schedule which, in terms of Section 19 of the Act, an insurance company is bound to fill up every five or ten years, as the case may be, and the scope of it is a general statement of the life insurance and annuity business of the company. Various particulars are required, which it is not necessary to quote, and then comes the tenth question, which is as follows:

"A table of minimum values (if any) allowed for the surrender of policies for the whole term of life, and for endowments and endowment assurances, or a statement of the method pursued in regulating such surrender values, with instances of its application to policies of different standing and taken out at various interval ages, from the youngest to the oldest."

It is obvious that the answer to this question made every five or ten years, as

the case may be, must be of a general description, but their Lordships do not doubt that the answer, though made in general terms, may be of such a character as to make it right to refer to the particular policy *de quo queritur* in order to see the surrender value under it. As to the meaning of the actual expression "surrender value" there can be no doubt. Surrender value in general means that value or consideration which a company has contracted or is prepared to pay at any particular time during the currency of the contract in consideration of being relieved as from that time of the liability dependent on the continuance of premiums paid. Their Lordships are of opinion that the surrender value referred to in the tenth question is the surrender value, if any, which the company has contracted to pay. Looking, however, to the terms of Section 64 the surrender value there referred to must necessarily be a cash value, for no other consideration could be compared in terms of money with the amount due in respect of the overdue premiums.

Turning now to the facts of the present case. The society's answer to question 10 in the schedule is set out in the judgment of Stout, C.J., and need not here be quoted at length. It explains that in respect of Australian policies, with the exception of guaranteed cash value policies.

"the society has not agreed to give cash surrender values, but it agrees in most of its policies to give paid up policies if applied for within a reasonable period after the lapse, provided three annual premiums have been paid."

It then goes on to explain the method of calculation as to amount. The policy itself, as will be observed from the terms of condition VII., already quoted, does not exactly follow this description; because the paid-up endowment which becomes due on the failure to pay after three years' premiums have been paid is granted automatically and without special application.

Applying what has been said to the above conditions, their Lordships are of opinion that Section 64 has no application to the present case, because the society does not by the policy contract to pay any cash surrender value. The thing which the society covenants to give is not cash, nor is it to be given in consideration of the assured relieving the society from any

liability under the policy : it is a fully-paid endowment to be given if and when the society's obligation to pay £1,000 under the policy has come to an end by reason of the non-payment of premiums. What is called the loan or cash value in the column with that heading is not a payment which the society makes to buy off the liability dependent on the continuance of premium paid, that is already gone, but a payment to get off the liability under the paid-up endowment.

Their Lordships are therefore of opinion that the conclusion of the majority of the Court was correct. In the argument their Lordships' attention was called to the case of *Equitable Life Assurance Society of the United States v. Bogie* (1), decided in the High Court of Australia. There were special circumstances in that case which were sufficient to dispose of it. As regards the general dicta it is enough to say that the policy in that case was essentially different from the present inasmuch as if the assured failed to apply he might have lost everything, and that in the absence of argument their Lordships do not think it expedient to express any opinion as to what the result in that case would have been if the specialities had been non-existent and it had been necessary to consider that policy in the light of the general remarks which their Lordships have made in this case. In their Lordships' opinion the proper course will be to declare that the policy in question had no surrender value within the 64th section of the Act, but that the provisions of such section are not capable of being waived by antecedent contract between the parties, and with this declaration to discharge the order appealed from so far as it answers third, fourth, and fifth questions in the summons. Subject to this their Lordships will humbly advise His Majesty that the appeal should be dismissed, the appellant to pay the respondent the costs of the appeal.

T. S. N. *Appeal partly allowed.*

Solicitors for Appellant—Burn and Berridge.

Solicitors for Respondent—Shaen Roscoe, Massey and Co.

** A. I. R. 1914 Privy Council.

(FROM JAMAICA).

24th July, 1914.

LORDS DUNEDIN, ATKINSON, SUMNER
AND SIR JOSHUA WILLIAMS.

West India Electric Company, Limited.—
Appellants

v.

Mayor and Council of Kingston.—Res-
pondents.

On Appeal from the Supreme Court
of Jamaica.

**** Land Acquisition—Compulsory powers of the Tramway company are those involved in and by construction of buildings—Site acquired for the use of its European Inspectors being not necessary for the working of the Tramway is not within the compulsory powers of acquisition of land by the Company. Section 5 Kingston and St. Andrews Tramway License, 1897, Section 9 of the Tramway Law 1895. Law 33 of 1897 and 38 of 1898 (Jamaica)—Words—Involves.**

The appellant company by private treaty acquired certain land for the use of its European inspectors. The respondent wanted to acquire the same land under its compulsory powers. The appellants contended in the main that the land could have been acquired under their compulsory powers and the respondent cannot therefore dispossess them.

Held, that under Section 5 Kingston and St. Andrews Tramway License, 1897, Land Clauses Law 1872, Sections 84 and 88 excepted, Law 33 of 1897 and 38 of 1898 (Jamaica), the exercise of compulsory powers of acquiring land is subject to the words of Section 9 of Tramways Law 1895 and under that it must be shown that the acquisition of the land to be taken is involved in and by the construction of the buildings necessary for the working of the Tramway pursuant to the licence. And acquisition of site for the use of European inspectors is in no sense necessary for the working unless the word is to be stretched until it becomes merely a synonym for convenient or advantageous.

R. Finlay and J. G. Archibald—for Ap-
pellants.

Charles and E. H. Bligh—for Respond-
ents.

Lord Sumner:—On 28th June, 1912 the Mayor and Council of Kingston, Jamaica, as the local authority, having previously caused the appellants, the West India Electric Company, Limited, to be served with notice to treat under Section 36 of the Parochial Boards Laws Consolidation Law (No. 17 of 1901), issued a plaint in the Kingston Court for assessment of compensation to be paid for taking a small portion of Oxford Pen

a piece of land which belongs to the appellants. Thereupon the appellants began the present action, in which they claimed an injunction to restrain the respondents from acquiring the site in question, and from proceeding further with the plaint. The hearing of a summons for an *interim* injunction was by consent, treated as the trial of the cause, and action was dismissed. An appeal was unsuccessfully taken, and the case now comes before their Lordships on appeal from the Supreme Court of Jamaica.

It is admitted that, as against a private owner or a company not possessed of any compulsory power of taking land, the proceedings of the respondents were competent and regular. The appellants seek to distinguish their position in respect of the land in question from that of private owners, and the burden is upon them to do so. They affirm that, in respect of the site, they were in a position to have acquired it under compulsory powers prior to the respondents, notice to treat; that they can be in no lower or worse position merely because they bought it by private treaty; and that, in a competition between their compulsory powers and those of the respondents, priority must be given to those first exercised, as they allege that in substance their powers must be deemed to have been, and hence that it would be inequitable and unlawful for the respondents to seek to take from them by compulsion what they must be treated as having previously taken from others compulsorily for the purpose of their undertaking and in exercise of their statutory powers as undertakers.

The substantial question on this appeal is whether the appellants had any compulsory powers of taking the site in question, if they had chosen to exercise them. It may be conceded for present purposes that they are not prejudiced by having bought the land as a voluntary transaction of purchase and sale, when they might have acquired it by compulsion on paying an assessed compensation for it, without inquiring whether there are any and, if so, what cases in which this proposition would not hold good. It may be conceded further, and similarly without further inquiry, that for the purposes of this case it is true that, if the land had been acquired compulsorily by the appellants, the respondents had thereafter

no power to take it away under their statutory compulsory powers.

The appellants are a company which among other things works the electric tramways of Kingston. The Board of Directors decided that it was necessary to employ a staff of European Inspectors for the regulation of the tramways. In tropical conditions such a staff required special housing accommodation, airy and spacious, quiet and attractive, with sufficient room for recreation and exercise. Accordingly, the company bought a site of considerable size, called Oxford Pen, in a convenient position. Part of this is occupied by residences, part is used as a common recreation ground. It is a strip, only thirty-three feet wide, at the extremity of this site furthest from the houses and at the bottom of the garden that the local authority proposes to cut off in order to make a new road over it.

There is no question that the purchase and user of Oxford Pen are *intra vires* the appellant company, but whether the acquisition of it for such a user would have been within its compulsory powers is a very different matter. Section 5 of the Kingston and St. Andrew's Tramways License, 1897, is as follows:

"Subject to Section 9 of the Tramways Law, 1895, the provisions of the Lands Clauses Law 1872, except Sections 84 and 88, are hereby incorporated with this license."

It is not necessary to set out the provisions of the Lands Clauses Law, 1872, above referred to; they are of a familiar type, and would suffice in themselves for the acquisition of Oxford Pen, if applicable. Section 9 of the Tramways Law, 1895, is as follows, so far as is material:

"In case the construction of any tramway, or of any works or building necessary for the working thereof, pursuant to the terms of the licence granted, involves the acquisition of any land adjacent to any street or road and extending to a distance not exceeding 150 feet from the roadway, it shall be lawful for the Governor in Council, in and by the license, or at any time subsequent to the granting thereof, to grant to the applicants compulsory powers to acquire any such land."

Oxford Pen was adjacent to two roads, and no part of it was distant more than 150 feet from one or other of them.

The appellants were incorporated as a company in Jamaica by Law 33 of 1897, which was afterwards amended by Law 38 of 1896. Among the objects specified

by Section 2 of the former Act, for which the company was incorporated, are

"the construction, acquiring, maintaining, and operating an electric tramway...including power-houses, factories, stations and laboratories in connection therewith, and the doing of all things reasonably necessary or incidental to the attainment of such objects."

And by Clause 6 of the licence it was made obligatory on the company "to construct.....maintain...and operate all the tramways" therein described "with all... necessary and convenient.....buildingsfor the due and efficient working of the said tramways...;" and it was further provided as follows:—

"Generally the licensees shall do and execute all and any other works necessary for the efficient construction, operation, and equipment of the tramways."

Their Lordships are of opinion that under these provisions the exercise of compulsory powers of acquiring land is subject always to the words of Section 9 of the Tramways Law, 1895, and that it must be shewn that the acquisition of the land to be taken is involved in and by the construction of buildings necessary for the working of the tramway, pursuant to the terms of the licence. This has not been shown. The erection of houses or the adaptation of existing houses for the use of European inspectors was no doubt a proceeding on the part of the company at once enlightened and humane, and was doubtless beneficial to the company and calculated to promote the efficient and profitable working of its tramways, but it was in no sense necessary for the working, unless the word is to be stretched until it becomes merely a synonym for convenient or advantageous. Neither do the words "working of tramway pursuant to the terms of the licence" assist the appellants' argument, for the terms of the licence, which impose obligations with regard to the working of the tramway, deal with things to be done to maintain the efficiency of the tramway and not the efficiency of the Tramway company's servants. The fact that the company is empowered to "do all things...reasonably necessary or incidental to the attainment of " the object (*inter alia*,) of operating the tramways does not enlarge the area of that necessity for the working, which is the test of the application of the compulsory powers given by the Act of 1895 and the licence of 1897.

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The appellants, however, contended that a new and less limited power to take land by compulsion was given by the Law No. 38 of 1898, Section 3 of which runs as follows:

"The provisions of the Lands Clauses Law, 1872, (Law 26), except Sections 84, 88, 104, 105 and 106, are incorporated with the company's special law in respect of undertakings of the company under any law or any licence approved by the Governor in Privy Council."

This section, unlike Section 9 of Law 27 of 1895, contains no words such as "in case the construction of any tramway or of any works or building necessary for the working thereof...involves the acquisition of land." From this it was inferred that Law No. 38 of 1898 conferred compulsory powers of acquiring land in furtherance of all or any of the objects of the company and particularly of "the doing of all things reasonably necessary or incidental to" the operating of the tramways. Their Lordships are unable to accept this inference. As appears from Section 2 of Law 26 of 1872, which is the definition section, "the company's special law," with which Law 38 of 1898, effects an incorporation of parts of the Lands Clauses Law, is Law 33 of 1897, and the incorporation is, so far as the tramway system is concerned, "in respect of undertakings of the company under any licence approved by the Governor in Privy Council," that is, the Kingston and St. Andrew's Tramways Licence, 1897. That licence by Section 5 incorporates a larger part of that Lands Clauses Law, but does so "subject to Section 9 of the Tramways Law, 1895." So far, therefore, from repealing or annulling these words, the Law of 1898, which is some months later in date than the licence, subjects the incorporation which it effects, "in respect of undertakings of the company under" the licence, to them. The whole licence must be read as one, that is, as though the incorporation effected by the Law of 1898, had been written into it, and then all the powers of compulsory acquisition which the company enjoys in respect of the Kingston tramways undertaking are subject to and prefaced by that reference to the Tramways Law of 1895, which makes necessity for the working of the tramways the touchstone of the right to take land by compulsion.

B. N. D. A. R. B. A. L. L. B.
VANI HIGH COURT.
SRINAGAR (Kashmir)

Their Lordships are accordingly of opinion that the order appealed from was right, and will humbly advise His Majesty that this appeal should be dismissed with costs.

T. S. N.

Appeal dismissed.

Solicitors for Appellants—Charles Russell and Co.

Solicitors for Respondents—Biddle, Thorne, Welsford and Gait.

A. I. R. 1914 Privy Council.

(FROM GOLD COAST COLONY.)

29th April, 1914.

LORDS ATKINSON, SHAW OF DUNFERMLINE,
MOULTON AND SUMNER.

Wassaw Exploring Syndicate Limited—
Appellants

v.

African Rubber Company, Limited—Res-
pondents.

On appeal from the Supreme Court of
the Gold Coast Colony.

(a) *Mining—Gold Coast Colony—Concessions Ordinance No. 14 of 1900—Granting of Concessions of Mining rights—Rights of cutting trees, etc.—Certificate of validity of concessions—Rights of competing rival concessionaires—The date of recording the certificate of validity determines priority—S. 23, Concessions Ordinance No. 14 of 1900—Rival Concessionaires—Concessions over the same piece of land—Courts can adjust the right of the parties by exercising their discretion—Ss. 13 and 16.*

The respondents obtained their concession in 1906 and applied for a certificate validating their concession in the end of 1909, which was granted on 29th July, 1912. The appellants obtained their concession only in 1909 but their certificate was recorded on 4th January, 1910.

Held, so far as the dates go the appellants' certificate which was recorded on 4th January, 1910 has priority to that of the respondents.

[P. 211, C. 1.]

Sections 13 and 16 clearly indicate that in the case of rival claims to or overlapping rights in any area which is the subject of a concession the Court can adjudicate the rights of parties by exercising their discretion and having the practical regulation of these rights determined on the spot.

[P. 212, C. 2.]

(b) *Words—Concession, meaning of—Gold Coast Colony Concession Ordinance.*

By the ordinance "concessions" means any writing whereby any right, interest or property in or over land with respect to minerals, precious stones, timber, rubber or other products of the soil purporting to be conveyed by a native. This definition does not extend to a sale or lease of the land itself or its surface.

[P. 212, C. 1.]

Younger and *J. W. M. Holmes*—for Appellants.

Greer, Owen Thompson and *C. E. O. Carter*—for Respondents.

Lord Shaw of Dunfermline :—This is an appeal from a judgment of the Full Court of the Supreme Court of the Gold Coast which affirmed a judgment of the Concessions Division of that Colony.

There is in operation in the Colony the Concessions Ordinance of the year 1900, as amended by subsequent Ordinances of the years 1901, 1902, 1903 and 1905. The Ordinance in question in the present case is No. 14 of the year 1900. Under that Ordinance a Divisional Court of the Supreme Court has jurisdiction to enquire into and certify as valid or invalid any concession, and by Section 8 it is provided that "no proceedings shall, without the leave of the Court, be taken to give effect to any concession unless such concession has been certified as valid by the Court." The question before their Lordships arises out of a decision by this Concessions Court.

Generally speaking, one may say that the object of this legislation is for the protection of the natives and the native chiefs, for the validation by the sight of the Court, upon inquiry, of concessions granted of mining rights, rights of cutting trees, &c., and for the regularizing of the rights of competing concessionaires by establishing priority among them *inter se*. On this last point Section 23 provides that:

"a certificate of validity shall be good and valid from the date of such certificate as against any person claiming adversely thereto."

In 1906 the respondents, the African Rubber Company, obtained a concession by agreement between Chief Cudjoe Sah of Arkwasu, on behalf of himself, his heirs and successors, and his tribe, by which the lessors granted, let, and demised to the respondents a parcel of land containing an area of five square miles "and all rubber, vines, fruits, trees, root and grass rubber, timber of all description, and surface rights and property in the said surface land and premises." Full and exclusive powers and liberty were granted to the respondents and their assigns to collect rubber, make clearings, construct farms, and to grow rubber or any other produce. The letting and demise also included all mines, mineral

substances, and precious stones, and gave power to erect buildings, roads, and the like, and to divert watercourses "and to do all acts, matters and things so absolutely and effectively" as if the respondents and their assigns were, for the term thereby "intended to be demised, absolute owner of the fee-simple." With regard to timber the grant was expressed thus: "with liberty to cut, remove, and fell, and carry away all trees, timber, shrubs and plants either for the purpose of carrying on the works of the lessees or for the purpose of sale."

As stated this agreement was made in 1906. An application was made in the end of 1909 for a certificate validating this concession. This was opposed by the appellants, the Wassaw Company, and on 29th July, 1912, the judgment appealed from, disallowing the Wassaw Company's opposition, was pronounced. The *locus standi* of the Wassaw Company, the appellants, was this: In 1909 they had obtained a concession from the succeeding chief of certain territory, part of which was the same as that contained in the concession granted to the respondents three years before. But the appellants promptly, that is to say, in the beginning of January, 1910, applied for and obtained a certificate of validity. So far as the dates go, accordingly, the appellants' certificate which was recorded on 4th January, 1910 has priority to that of the respondents.

The Wassaw Company now pleads its right, under the demise to it, altogether to exclude the African Rubber Company from the overlapping portion of the territory, to prevent it from either planting or cutting trees thereon, and in short to treat it as a trespasser in going upon the land for any purpose. This was the argument presented to their Lordships.

The Wassaw Company's lease is printed. It is true that it is expressed to be "a demise and grant" of a certain parcel of land, together with all the mines and minerals therein. The period of the grant is for ninety-nine years. There then follow clauses beginning: "It is hereby agreed and declared that during the continuance of this demise the company shall have full free and exclusive liberty" to sink and make pits, erect bridges, use ground as timber-ground, take and carry away minerals, make tramroads,

"and also to cut, hew down, and fell and take away any timber or trees on the said lands for the use of the steam-engines and machinery used in the said mines and for the erection and maintenance of any buildings, works, and contrivances thereon."

It is upon the earlier portion of this clause, as a comprehensively exclusive demise, that the appellants take their stand.

Their lease further proceeds to give power to divert and turn water and watercourses "for the purpose of more effectually exercising and enjoying the liberties and privileges and easements hereby granted," and also to do all necessary acts or use all necessary devices "for the efficient working of the mines and premises hereby demised." The demise concludes by giving to the company peaceable possession in these terms, which their Lordships think are important namely: That they shall

"peaceably and quietly possess and enjoy the mines and premises hereby demised and exercise the rights and privileges hereby conferred without any interruption by the chief," etc.

The appellants in certain portions of their written grounds of opposition appear to concede the practical limits of the rights thus conferred upon them. They confine their position to that of mining lessees, and they claim

"the right to such timber as may be required for purposes ancillary to such mining with the usual incidental powers and rights necessary for the beneficial enjoyment of such concession."

Basing their priority on the concession record, this appears to their Lordships to be a correct statement of the measure of their rights. This the respondents, the African Rubber Company, have never disputed. And it ought to be further added, in fairness to the Courts below, that in these Courts this measure was never questioned or denied. Nor do their Lordships see any occasion to doubt that, supposing the proceedings had gone to the further stage of granting to the respondents a certificate of their, the respondents' title, that certificate would have been so worded as amply to protect any prior mining rights and all rights ancillary thereto which had been created in the appellants by their first validity concession.

It is now maintained, however, by the appellants, and it appears also to have been so argued in the Courts below, that the terms employed in their lease are of

such a character as to give them a demise of the land itself with the exclusive possession for ninety-nine years thereof and of all the timber thereon, and with a right also to prevent trespass on any part of the area in question. Their Lordships cannot so construe the rights of the appellants.

In the first place, it has to be observed that a right of exclusion of this character as arising out of the agreement of lease if treated as a demise of land does not appear to be within the definition of "concession" or to be the subject of validation by the Concessions Court, or to gain any priority thereby. By the Ordinance "concession" means "any writing whereby any right, interest or property, in or over land, with respect to minerals, precious stones, timber, rubber, or other products of the soil" purports to be granted by a native. This definition does not extend to a demise of the surface of the land, nor does it extend to a sale or lease of the land itself. Even if the lease were construed as a demise of the land it is something which is not a concession and to which priority under the Concession Ordinance has no application.

In so far, moreover, as the lease bears this character it cannot be pleaded in a question with the respondents, the African Rubber Company, who, three years before had in fact obtained a title of a similar or rather of a much broader character and not confined to mining purposes or purposes ancillary thereto. What is being done, as their Lordships understand, is that the respondent company, under their lease of 1906, are cutting certain rubber trees and planting others, and developing the property in an agricultural and arboricultural sense. All this, (subject to the appellants' mining needs) appear to be within the respondents' just rights.

The next point, however, is the general one and is of importance. The appellants, having got first on the concessions record with their mining lease, propose to prevent these operations of the respondents upon the area in question, because of the use of the word "exclusive" in that lease. They admit that they could not develop this territory themselves, indeed that they could not cut a tree upon it, except for their mining purposes. But they construe their rights as if the lease entitl-

ed them, to prevent any development of this large tract of land, by any one else. Their plea is that it can never be known, if, say, trees were cut down, whether in the course of a century they, the Wassaw Company or their successors, might not come to require those trees. In their Lordships' opinion this plea is not well founded. Although the term "exclusive" is employed it has to be admitted, that this term must be taken along with one specific and particular purpose and the strictly limited nature of the rights of mining which are the subject of the grant. Accordingly the word cannot be interpreted, comprehensively for the result, upon such an interpretation, would produce a quite impracticable situation.

The Concessions Ordinance entirely covers such a case. It is provided under Section 13 that

"it shall be lawful for the Court in its discretion to make such modifications in the terms of any concession and to impose such conditions with respect to the issue of any certificate of validity as to the Court shall seem just."

It is then provided by Section 16 that the certificate of validity shall *inter alia* contain a statement "of any limitations, modifications and conditions imposed by the Court." Nothing could more clearly indicate that in the case of rival claims to, or overlapping rights in, any area which is the subject of a concession, the Court can adjust the rights of parties by exercising their discretion and having the practical regulation of these rights determined on the spot.

Their Lordships accordingly must repel the plea put forward by the appellants in this case in so far as it is a claim for exclusive possession of land, or to a right to exclude the respondents from it, or from exercising upon it all such rights of cutting and planting timber and the like as do not in point of fact invade the rights of the appellant company as mining lessees.

It is with regret, however, that their Lordships have to observe that the actual order made in this case, in so far as it dismissed the opposition of the appellants at a stage prior to the actual terms of the certificate to be proposed being announced, was premature. The judgment referred to is that of 24th February, 1913. The Court, says that judgment

"is of opinion that the grantor retained the right to grant concessions subject to the prior

rights of the opposers under their certificate of validity."

This opinion, their Lordships think, was correct. But when the order proceeded

"The Court is therefore of opinion that the Court of first instance was justified in dismissing an opposition which appears to be based entirely upon hypothetical grounds."

Their Lordships unfortunately cannot agree. The appellants hold a title by their prior certificate to what was to some extent a competing right in regard to the same area of ground, and in these circumstances they think that the appellants had a right to remain in Court until the terms of the certificate came to be adjusted. Their Lordships do not doubt that, now that the claim of the appellants on the arguments submitted has been settled in the negative, the certificate of validity of the concession to the respondents will be dealt with by making such limitations, modifications, and conditions as will conserve the mining rights of the appellants and those rights of cutting timber which are ancillary thereto.

In the circumstances the orders for costs in the Courts below will not be disturbed, but their Lordships will humbly advise His Majesty to allow the appeal, and to remit the case to the Supreme Court, so that the proper steps may be taken for issuing to the respondents a certificate with the requisite limitations, modifications, and conditions, the respondents having leave to object thereto if so advised. Their Lordships are not inclined to think that the appellants would have been prejudiced by allowing the case to go forward to a certificate, the views of the Court in the direction of protecting their (the appellant's) rights having been made plain. There will be no costs of the present appeal.

T. S. N.

Order varied.

Solicitors for Appellants—Ingle, Holmes, Sons and Pott.

Solicitors for Respondents—Fraser and Christian.

*** * A. I. R. 1914 Privy Council.**

(FROM AUSTRALIA.)

14th July, 1914.

LORDS DUNEDIN, ATKINSON AND SUMNER
AND SIR JOSHUA WILLIAMS.

Corrie and another—Appellants

v.

Mac Dermott—Respondent.

On Appeal from the High Court of Australia.

**** Land Acquisition—Compensation for, to be paid on the value of the land to the owner, and not on the value to the taker—Restrictions imposed on the land should be taken into consideration in fixing compensation—The chance of such restrictions being discharged should also be kept in view.**

The Acclimatisation Society of Queensland was constituted under Acts of Parliament for carrying out experiments in acclimatisation of animals and lands. The Crown granted a piece of land to the trustees of the society upon trust for the appropriation thereof to the purposes of the Society only, reserving to itself among other rights, the right to resume the land for any public purpose whatsoever, on paying its "value." No right of sale in favour of the trustees and no general power of sale of this land was conferred upon them by any statute. On resumption by the Crown the society claimed to be paid compensation on the basis of the land unrestricted in any way.

Held, that this restriction regarding sale must be taken into consideration in fixing the compensation to be paid for the land taken. *Hilcoat's Case* 10 C. B. 327, *Stebbing's Case* L. R. 6 Q. B. 37 discussed. [P. 215, C. 2.]

Held, also that the word "value" cannot be interpreted as "unrestricted value" unless it was specifically expressed to be such. And the reservation of this right for resumption in spite of their being general acts which gave compulsory powers of acquisition to the Crown was because this right was to be exercised "for any public purpose whatsoever." [P. 216, C. 2.]

P. O. Lawrence and Dawson—for Appellants.

R. B. Finlay, Micklethwait and D'Egville—for Respondent.

Lord Dunedin :—The acclimatisation Society of Queensland is a society constituted under Acts of Parliament for the purpose of carrying out experiments in acclimatisation of animals and plants using the latter words in its widest sense. The society holds land where its experiments are carried out. Such land is held by the society through the medium of trustees, who hold the same in trust for the uses of the society.

By deed of grant of 17th July, 1892, the land which forms the subject of this

appeal was granted by the Crown to trustees for the society "upon trust for the appropriation thereof to the use and for the grounds of the acclimatisation of Queensland, and for no other purpose whatsoever."

Mines of gold, silver and coal, were reserved to the Crown, and the deed of grant contained also the following clauses:—

"And we do further reserve unto us our heirs and successors full power for us or them or for the Governor for the time being of our said Colony with the advice aforesaid to resume and take possession of all or any part of the said land which may be required at any time or times hereafter for any public purpose whatsoever twelve calendar months' notice of its being so required being previously given in the *Government Gazette* or otherwise and the value of the said land or of so much thereof as shall be so required and of any building standing on the said required land being paid by the Government to the party entitled thereto at a valuation fixed by arbitrators chosen as hereinafter mentioned in which valuation the benefit to accrue to the said party from any such public purpose shall be allowed by way of set-off."

Then follows an arbitration clause providing for appointment of arbitrators and umpire in-common form.

The deed contained no power of sale in favour of the trustees, and no general power of sale of this land is conferred on them by any of the Acts under which the society is governed; but by an Act of 1907 the society was allowed to sell any part of its lands to the local authority, and to the National Agricultural and Industrial Association.

In 1911, the Government resolved to exercise the above narrated power of resumption, and gave the necessary notice. Arbitrators and umpire were appointed; the arbitrators disagreed and the umpire made his award in the following terms:—

1. I find that the value of the total area of the land proposed to be resumed as aforesaid as set out in the said schedule hereto on the basis of freehold land unrestricted in any way and as land held in fee simple is the sum of seven thousand four hundred and ninety pounds, £7,490.

2. I find that there is no building on the said land.

3. I find that the value of the total area of the said land proposed to be resumed as aforesaid as set out in the said schedule hereto being required for a public purpose (namely, an exhibition ground in accordance with the said deed of grant and reference is the sum of three thousand eight hundred and thirty-five pounds (£3,835).

4. I find that the value of the benefit to accrue to the said trustees from the said public purpose by way of set off is nil, I award and determine

that the valuation of the said land described in the schedule hereto in accordance with the said deed of grant and reference is the sum of three thousand eight hundred and thirty-five pounds (£3,835) which amount is the amount I award and adjudge to be paid by the Government to the said trustees being the party entitled thereto."

The Government paid the sum of £ 3,835 and was by arrangement given possession of the land subject to the question of the sum truly due being settled by special case. A case was accordingly presented to the Supreme Court of Queensland in which the questions put were as follows: "The questions for the Court are:—

"(1) What are the rights of the parties under the said determination?

"(2) Is the said society entitled to the said sum of £ 7,490 mentioned in the said determination?

"If the Court is of opinion that the sum of £ 7,490 in the said determination mentioned is the amount payable by the defendant to the plaintiffs judgment is to be entered for the plaintiffs for the sum of £ 3,655 but if the Court is not of opinion that the said sum of £ 7,490 is the amount payable the plaintiffs are to accept the sum of £ 3,835 already paid in full satisfaction of their claim and judgment is to be entered for the defendant accordingly."

The Supreme Court of Queensland held that the society was entitled to the sum of \$ 7,490, of which £ 3,835 being already paid left a balance due of £ 3,655 for which sum they gave judgment. Appeal was taken to the High Court of Australia, who by a majority of three to one reversed the judgment of the Supreme Court of Queensland and gave judgment in favour of the defendants. From that judgment the present appeal is to this Board.

If this case be viewed as an ordinary case of compensation their Lordships think that the law is not doubtful. The general principle was restated in the very recent case of *Cedars Rapids Manufacturing and Power Co. v. Lacoste* (1), before this Board, which approved of the general statement by Lord Moulton in the case of *In re Lucas and Chesterfield Gas and Water Board* (2). The value which has to be assessed is the value to the old owner who parts with his property, not the value to the new owner who takes it over. If, therefore, the old owner holds the property subject to restrictions, it is a necessary point of enquiry how far these restrictions affect

(1) (1914) A. C. 569.

(2) (1909) 1 K. B. 16.

the value. It is evident that in this case, always under the assumption above stated, this view is destructive of the arbitrators' finding for £ 7,490 being applicable; for that value is only upon the view that the ground is "unrestricted in any way."

A good deal of argument seems to have been used in the Court below and was to a certain extent repeated before their Lordships, upon the supposed discrepancy of principle contained in the judgments in *Hilcoat's Case* (3), as opposed to those in *Stebbing's Case* (4). In their Lordships' opinion both cases are consistent with the general principle above laid down, and the only difference arose from the application of that principle to different facts.

Hilcoat's Case (3) arose upon the question of an exception to a direction given to a jury. Under an Act of Parliament, a Railway Company was authorized to take the church of St. M. and certain ground attached thereto upon the terms that they should only get possession when with the consent of the Bishop of the diocese and the Archbishop of York a price had been fixed—in the fixing of such price regard being had to the cost of getting a new site and erecting a new church and compensating the person entitled to the land not actually forming part of the church, which sum should be held by the two ecclesiastical persons aforesaid for the purpose of procuring a new site and erecting a new church, and for compensating the person entitled as aforesaid. The Bishops agreed with the Railway Company for the sum of £ 7,700 odd and indemnity against any claim by the incumbent. They then offered the incumbent (who was the person entitled to the land not occupied by the church as aforesaid) the sum of £ 300. This he refused and raised action. The case was tried by Wilde, C.J., who directed the jury, first, that the fact of the Bishops fixing £ 300 as a proper sum for compensation did not bind the plaintiff; and secondly that they were not bound to estimate the value of the ground to which the plaintiff was entitled, as land irrevocably appropriated to spiritual purposes, of which the plaintiff could make no pecuniary advantage, but that it was competent to

them to form this estimate of the value with reference to all the circumstances that had appeared in evidence before them. The jury found for the plaintiff and assessed damages at £ 1,540. Upon a rule being granted the Court held that the directions were right.

It seems quite plain that although, as above said by their Lordships, restrictions must be kept in view, the chance of such restrictions being discharged must also be kept in view. That was all that was decided in *Hilcoat's Case* (3), and in their Lordships' view rightly decided. Whether under the circumstances of the case the jury did not give too much is quite another matter, and does not affect the principles of the case.

In *Stebbing's Case* (4) the ground taken was part of city churchyards in which any further burial had been prohibited by Order in Council. The rector claimed that he should be paid for his freehold interest in the said churchyards the value of the ground as if it were unrestricted, minus the sum which it would cost to remove the human remains to other ground. The Board of Works (who had taken the ground) contended that the value to be assessed was the value of the ground as it stood in the rector's hands. It was thus decided, and the decision upon principle is strictly right. The case does not disclose whether the arbitrator (who had formulated the contending principles to be decided by special case) eventually settled that the rector's interest was pecuniarily *nil*. There are doubtless indications in the judgments that this was the view of the judges. In so saying, however, they in strictness went beyond their province. Strictly the rector was entitled to have valued his chance of ever getting the land in his hands in such a condition as could bring pecuniary value. But the valuation under the circumstances might well be *nil*.

Now it may be remarked that a restriction which prevents selling, though it must be taken into account, and may very well affect the value, does in no way reduce the value to *nil*. To a judge on the facts in *Stebbing's Case* (4) it might indeed well appear that the value was *nil*. For the land could not be sold, for it was dedicated to spiritual purposes; and further its use so far as profitable, as *e. g.*, in the matter of fees, was also ex-

(3) 10 C..B. 327.

(4) L.²R. 6 Q. B. 37.

hausted, for the ground was full and no further interments were possible because of the Order in Council. But other circumstances would lead to a perfectly different result, and as an illustration their Lordships would refer to a case which, though not at law, was decided by a judge of authority, the late Lord Shand. A strip of land in the West Princes Street Gardens below the Castle Rock in Edinburgh was taken by the North British Railway under an Act of Parliament under terms of paying compensation to the corporation of Edinburgh, who were the owners of the ground. By Act of Parliament the corporation was prohibited from ever building on the land, or alienating it; but were bound to keep it for all time as a public garden.

Under the circumstances the railway company contended before Lord Shand, who was chosen as sole arbitrator, that the land was worth nothing, and that a mere nominal sum should be paid. The corporation on the other hand maintained that the true compensation was what would provide another strip of exactly the same quality; and as this could only be got by taking Princes Street itself, that the money value must be estimated at what it would cost to buy a strip of Princes Street—the most valuable site in Edinburgh. Lord Shand held both these views to be wrong. He held that, the corporation being restricted, the value could not be measured by the value of unrestricted land in a similar position; but that on the other hand the land was of value to the corporation who enjoyed it with the rest of the adjoining land, for the use of the citizens as a garden, which garden would be so much the less valuable because it was smaller; and he assessed on that view. Their Lordships consider that this judgment proceeded on correct principles.

The appellants, however, argued that the assumption on which all that has been so far said proceeds cannot properly be made; that the present case is not one of ordinary compensation; but that in terms of the words of the bargain the value which is to be paid is the value of the land unrestricted.

Their Lordships cannot accede to this view, and they agree particularly with the reasoning of Isaacs, J, on this part of the case. In their opinion it puts upon

the word "value," an amplification of the bare word, treating it as if it was "unrestricted value," which it will not bear. And, further, the law of compensation being as they have stated it, namely, the value to the owner as he holds, which law has been so often laid down that it must be held to have been known to the contracting parties, it was, their Lordships think, incumbent on a party who wanted the valuation to proceed upon another footing to take care that the words used clearly so expressed it.

The appellants also argued that there must have been some reason for a special clause with a special tribunal being stipulated for in view of the fact that there exist general Acts which give very ample powers of resumption to the Government on payment of compensation in ordinary form. The simple answer to this seems to be that although the powers under the general Acts are very ample they are restricted to actual purposes specified, whereas this clause gave the Government power to resume "for any public purpose whatsoever," a fact which seems to account amply for the presence of the special clause.

It will, of course, be noticed that the third finding of the umpire is based upon an obviously irrelevant consideration. By the form of the question here the only point reserved for consideration is whether the first finding as it stands expresses the correct principle, and parties are agreed and have so argued the case that failing the first they will be content with the sum brought out in the third although the principle upon which it was brought out was erroneous.

For the reasons above stated their Lordships are of opinion that the first finding does not express the value upon which the society are entitled to be paid and that the judgment of the High Court was right. They will humbly advise His Majesty to dismiss the appeal with costs.

T. S. N.

Appeal dismissed.

Solicitors for Appellants—Blyth, Dutton Hartley & Blyth.

Solicitors for Respondents—Freshfields.

A. I. R. 1914 Privy Council.

(FROM CANADA.)

26th June, 1914.

LORDS MOULTON, PARKER OF
WADDINGTON, SUMNER AND
SIR GEORGE FARWELL.

*British Columbia Electric Railway Com-
pany Limited*—Appellants

v.

*Vancouver, Victoria and Eastern Railway
and Navigation Company and Corporation
of the City of Vancouver*—Respondents.

On appeal from the Supreme Court of
Canada.

*Ultra vires—Jurisdiction—Powers of Board
of Railway Commissioners by, an order autho-
rising over-bridges to apportion cost to Provin-
cial Railway—Ss. 59, 237 and 238 of the Rail-
way Act (R. S. Can. 1906, C. 37—British
North America Act. 1867 (30 Vict. C. 3), S. 92
—Sub-S. 10—The mere fact that a third party
would be benefited by the works could not give
the Board jurisdiction to make them pay a
portion of the cost when the order is not one
under S. 59 but merely a permissive one.*

The British Columbia Electric Railway Com-
pany, Limited were operating street Railways in
City of Vancouver, under a Provincial Act of
British Columbia, which crossed by level crossings
the tracks of the Vancouver, Victoria and Eastern
Railway and Navigation Company incorporated
under the Dominion Legislation of Canada and
declared a work of general advantage. The tracks
of the Dominion Railway were crossed by four
streets and the Railways of the Provincial Com-
pany ran along two of these streets. The Corpo-
ration of the City of Vancouver applied to the
Commissioners of the Railway Board for the con-
struction of viaducts for carrying the four streets
across the Railway track so as to avoid the gradi-
ents due to the low-level of the Railway track,
and for apportionment of the costs to be borne by
each. The Provincial Company were required
to pay part of the expenses on the ground that
they would 'substantially benefit' by the altera-
tion:—

Held:—There is nothing in the Railway Act
giving jurisdiction to the Board of Railway Com-
missioners by its order to impose part of the
cost of the proposed work on the Provincial Rail-
way Company. Sections 227 and 229 of the
Railway Act subject only the level crossings to the
jurisdiction of the Railway Board and do not
deal with street improvements. The order of the
Board was not made under Section 59 of the Act
whose provisions relate to a wholly different class
of cases from the one in this case where the order
was purely permissive granting a privilege to the
Corporation which it may avail itself of or no.
The application by the Corporation was a matter
between the Corporation and the Dominion Rail-
way Company alone. The Provincial Company
was entitled to be present to see that its interest

were not prejudiced, but the application was not
made against it nor was it asking any privilege
from the Railway Board so that its presence did
not give to the Railway Board any jurisdiction to
pass the order in question. [P. 219, C. 1 & 2.]

Upjohn, Bodwell and Gordon Browne—
for Appellants.

*R. B. Finlay, Arthur Page, and J. G.
Hay*—for Respondents.

Lord Moulton:—The appellants, the
British Columbia Electric Railway Com-
pany, Limited (referred to herein as the
"tramway company"), are a company
working street railways in the city of
Vancouver under powers conferred upon
them by an Act of the Legislature of the
Province of British Columbia. Their
railways are local street railways wholly
situated within the Province of British
Columbia, and have not been declared to
be for the general advantage of Canada or
for the advantage of two or more provin-
ces, so that they have not passed into the
domain of legislation of the Dominion
Parliament.

The respondents the Vancouver, Victo-
ria and Eastern Railway and Navigation
Company (referred to herein as the "rail-
way company") are a company owning
and working a railway which has been
declared to be a work for the general ad-
vantage of Canada. It is therefore under
Dominion legislation. Its tracks run
through the city of Vancouver, of which
the other respondents (hereinafter refer-
red to as "the corporation") are the
municipal authority.

The litigation out of which the present
appeal arises relates to a portion of the
track of the railway which runs along the
bottom of a valley with somewhat steep
sides, the general direction of which is
north and south. That valley is included
within the limits of the city of Vancouver,
and streets run across and along it, but
owing to the inequality of the levels there
has been but little building along those
streets. One street, known as Raymur
Avenue, runs along the valley parallel to
the railway track and near to it. Four
streets, whose direction is east and west,
cross Raymur Avenue and the railway
track at right angles. These streets are
known as Hastings Street, Pender Street,
Keefer Street, and Harris Street. Tracks
of the tramway company pass along Has-
tings Street and Harris Street, and cross
the tracks of the railway company by
level crossings.

For some time prior to July, 1912, the corporation had under consideration a plan for carrying the four streets above referred to across the railway track on viaducts, so as to avoid the gradients due to the low level of the railway track. Owing to their not having decided whether or not they should adopt this plan, they had been unable to grant any of the numerous applications which had been made to them for building permits along those streets, inasmuch as the grades of the streets could not be determined. Early in 1912, however, they passed a by-law authorizing the construction of these four viaducts. Such a by-law required the assent of the citizens to give it validity, and on being put to the vote it failed to obtain the requisite support on account of the great expense that the construction of the viaducts would entail on the corporation.

Under these circumstances the corporation proceeded to apply to the Railway Board for an order authorizing the construction of the viaducts and declaring the respective proportions in which the cost of the bridges, &c., should be borne by the railway company and the corporation. Originally no notice of this application was served upon the tramway company. But at the hearing of the application it was pointed out that inasmuch as the proposed constructions would affect the crossings of the tramway company they ought to be served with a copy of the application. Counsel representing the tramway company were present in the Court at the time and consented to accept service, so that the hearing was continued without interruption. But although the tramway company were thus made parties, their counsel took no part in the discussion except to oppose the contention put forward by counsel on behalf of the respondent railway company, that the tramways company should bear a part of the cost of the construction of the viaducts and the street improvements connected therewith.

At the conclusion of the hearing the Railway Board indicated that they would grant the application of the corporation and apportion the cost of the works among the Railway company, the corporation, and the tramway company, and on 14th October, 1912, they accordingly made an order the operative part of which is as follows: "It is ordered as follows;—

"1. The applicant is hereby authorized to construct Hastings Street, Pender Street, Keefer Street, and Harris Street across the tracks of the Vancouver, Victoria, and Eastern Railway and Navigation Company, in the said city of Vancouver, by means of overhead bridges, as shown on the plan filed with the Board under file No. 20,062, detail plans of the said structures to be submitted for the approval of the chief engineer of the Board.

"2. Twenty per cent. of the cost of the actual construction work at each of the crossings on Pender and Keefer streets, not to exceed in each case the sum of \$ 5,000, shall be paid out of the Railway Grade-Crossing Fund, 25 per cent. of the remainder of the costs of such work shall be borne and paid by the applicant, and 75 per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Company. Twenty per cent. of the cost of constructing Harris Street Bridge, not to exceed the sum of \$5,000, shall be paid out of the Railway Grade-Crossing Fund; 20 per cent. of the remainder of such cost to be paid by the applicant, 20 per cent. by the British Columbia Electric Railway Company, and 60 per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Company. Twenty per cent. of the cost of constructing the Hastings Street Bridge shall be paid by the applicant, 20 per cent. by the British Columbia Electric Railway Company, and 60 per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Company.

"3. The cost of depressing the tracks of the Vancouver Victoria and Eastern Railway and Navigation Company shall be included in the cost of the work.

"4. The cost of maintaining the said Keefer, Pender, Harris and Hastings Street Bridges shall be borne and paid 50 per cent. by the applicant and 50 per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Company.

"5. In case of dispute between the parties in carrying out the terms of this order, the same shall be settled by the chief engineer of the Board."

The tramway company thereupon applied to the Supreme Court of Canada for leave to appeal to that Court from the above order in so far as the said order directed that the tramway company should pay a portion of the cost of construction of the Harris Street bridge and of the Hastings Street bridge, and duly obtained permission so to appeal on the ground that the Railway Board had no jurisdiction to order the tramway company to pay any portion of the cost of the bridges and other works mentioned in their order.

The appeal came on before the Supreme Court of Canada on 7th April, 1913, and was dismissed with costs by a majority of the judges of that Court, Duff and Brodeur, JJ. dissenting. The order dismissing the appeal is dated 6th May,

1913, and it is from this order that the present appeal is brought.

Their Lordships entirely agree with the remarks of Duff, J. as to the ground and reason of the application of the corporation to the Railway Board. Referring to the statement made at the hearing by Mr. Baxter, who represented the corporation, he says:

"Mr. Baxter's statement makes it quite clear that the occasion for the application arose from the necessity of determining the permanent grade of these four streets. It was a question, he said, whether on the one hand the grade was to be elevated, or on the other the grade was to be made to conform to the grade of the railway tracks and level crossings established. It was necessary to have the matter disposed of because people were applying for permits to build upon these streets, and these could not be granted owing to the inability of the Municipality to give the grade of the streets. The council preferred the former of the two alternative courses because they recognized that the street grades were too low and must inevitably be raised."

It follows therefore that the application was a matter between the corporation and the railway company alone. The tramway company was entitled to be present to see that its interests were not prejudiced by any order which might affect injuriously property belonging to it. But the application was not made against it, nor was it asking any privilege from the Railway Board, so that its presence did not give to the Railway Board any jurisdiction to make this order against it. If the Board possessed any such jurisdiction it must be derived from the provisions of the statutes which created it and gave to it its powers. Their Lordships can find nothing in those statutes which empowers the Railway Board to make any such order against the tramway company. The only portion of the tramway lines which was subject to the jurisdiction of the Railway Board was the actual crossings, and those only so far as concern Sections 227 and 229 of the Railway Act, and these sections have nothing whatever to do with such matters as these street improvements. So far as concerns the cost of the bridges or the cost of lowering the track of the Railway company (which by the order was included in the cost of the viaducts) the tramway company was in precisely the same position as any private citizen of the city of Vancouver. It is evident from the reasons given by the Railway Board that they directed the tramway company to pay a

proportion of the cost of the improvements because they were of opinion that the tramway company could benefit by them. They say:

"It being a substantial benefit to them we are of opinion that they should contribute to the cost of the two bridges they will use. That is the bridges at Hastings Street and at Harris Street."

The same language might have been used about a private citizen owning some large shop on one of the streets, or owning property on either side of the valley, who would profit by the connection being on the level instead of by two steep and opposite grades, and such a private individual would be just as much under the jurisdiction of the Railway Board as was the tramway company. The fundamental error underlying the decision of the Railway Board is that they have considered that the fact that the tramway company would be benefited by the works gave them jurisdiction to make them pay the cost or a portion of it. There is nothing in the Railway Act which gives any such jurisdiction.

An attempt was made to treat the order of the Board as being made under the powers of Section 59 of the Railway Act, and it was contended that that section entitled the Railway Board to require that the tramway company should pay a portion of the expense. It is sufficient to point out that the order is not made under Section 59 nor does it come within its provisions. It does not direct that any work should be done. It is an order of a purely permissive character granting a privilege to the corporation which they may exercise at the expense of a third party, and it leaves it to the corporation to decide whether they shall avail themselves of it or not. The provisions of Section 59 relate to a wholly different class of cases.

It is not necessary for their Lordships to deal with any of the other weighty reasons given in the judgment of Duff, J. On the grounds above stated they are of opinion that the order so far as it directed the appellant to pay a portion of the costs was made without jurisdiction, and they will humbly advise His Majesty that the appeal should be allowed with costs, and that the order of the Supreme Court should be set aside, and that in lieu thereof an order should be made, with costs, allowing the appeal to the Supreme Court

of the present appellants and setting aside the order, dated 14th October, 1912, of the Board of Railway Commissioners, in so far as the said order directs that the British Columbia Electric Railway Company, Limited, shall pay a certain proportion, as provided in the said order, of the cost of the construction of the Harris Street Bridge and the Hastings Street Bridge referred to.

T. A. R.

Appeal allowed.

Solicitors for Appellants—Linklater, Addison & Brown.

Solicitors for Respondents.—Blake and Redden; Lawrence Jones & Co.

A. I. R. 1914 Privy Council.

(FROM AUSTRALIA).

23rd April, 1914.

VISCOUNT HALDANE, LORDS DUNEDIN

SHAW OF DUNFERMLINE,

MOULTON AND PARKER OF

WADDINGTON.

Australian Widows' Fund Life Assurance Society, Limited—Appellants

v.

National Mutual Life Association of Australasia Limited—Respondents.

On appeal from the High Court of Australia.

(a) *Insurance—Life insurance—Policy providing that it should be avoided if the documents on the faith of which policy was granted contained untrue statement—Liability under policy was conditional on truth of every statement of fact contained in the documents forming the basis of the contract.*

A life insurance policy contained a clause to the effect that the policy should be avoided if, the proposal or any document on the faith of which the policy was granted contained any untrue statement.

Held, that the liability of the insurer under the policy was conditional on the truth of every statement of fact contained in the several documents which were made the basis of the contract, except the statement as to the age of the assured, with regard to which special provision was made *Thomson v. Weens*, 9 App. Cas. 671 Foll.

(b) *Insurance—Life insurance—Policy containing recital that the insurer had agreed to accept the proposal of the person to be assured—Recital has not the effect of incorporating in policy all the terms of the proposal.*

A policy of insurance recited that the insurer had agreed to accept the proposal of the person to be insured.

Held, that this recital had not the effect of incorporating in the policy all the terms of the proposal. The recital might very well mean that

the insurer had determined to accede to the application of the proposer for a policy leaving the terms on which such policy was granted to be specified in the ordinary way in the policy itself. According to the proceeding recital the policy was to incorporate the statements contained in the proposal and not the proposal itself.

(c) *Practice—Pleadings, admission in—Construction of life insurance policy—Wrong construction was assumed by P. C. to be correct, in view of the admission—Admissions.*

Where a party admitted against himself that a certain life insurance policy should be construed in a particular manner.

Held, by the Privy Council that although the construction admitted was wrong, their Lordships would assume, in view of the admission in the pleadings, that the construction was correct.

(d) *Insurance—Life Insurance—Insurer re-insuring the life of the insured, with another insurer—The express terms of policy of re-insurance different in nearly every respect from those of original policy—Circumstances showing policy of re-insurance was not a mere contract of indemnity—Recital that the re-insurer accepted the risk under the re-insurance "on the same terms and conditions as those on which the original insurer granted the policy and by whom, in the event of claim the Settlement will be made" cannot control the express provisions of the policy of re-insurance—Deed construction—Contract.*

The respondent company granted a policy of life insurance to one Patrick and they re-insured his life with the appellants for the same amount. The policy of re-insurance made the liability under it, conditional on the truth of certain statements made by the insured at the time when the original policy was effected but contained a recital that the re-insurer accepted the proposal of the original insurer. The proposal of the original insurer, recited, "It is understood that in accepting the risk under this re-insurance the Australian Widows' Fund Life Assurance Society Limited" (i.e. the appellant Society) "does so on the same terms and conditions as those on which the Mutual Life Association of Australasia" (i.e. the respondent association) "have granted a policy and by whom in the event of claim the Settlement will be made." The expressed terms of the policy of re-insurance were in almost every respect different from the terms of the original policy. Everything pointed to the policy of re-insurance being an independent contract of assurance and not a contract of indemnity. On the death of the insured, the respondent association paid the amount due under the policy and claimed it from the re-insurers the appellants. The appellants contended that the statements made by the insured being false, their liability was discharged.

Held, that the plain terms of the policy of re-insurance cannot be contradicted by the clause in the proposal of the original insurer even assuming, for arguments sake it was incorporated in the policy of re-insurance, which clause should almost necessarily be construed as if it were prefaced with the words "except as herein otherwise provided." For the same reason the words in the clause "by whom in the event of claim the Settlement will

be made " cannot be construed as meaning that if the respondent association acting reasonably and in good faith admit and settle its own liability under the original policy the appellant society is bound by that admission and settlement. The appellant society is not and never was liable on the policy of re-insurance as the statements of the insured were false.

[P. 223, Cs. 1 & 2; P. 224, C. 1.]

Leslie Scott and *Mackinnon*—for Appellant.

R. Finlay and *Cababe*—for Respondents.

Lord Parker of Waddington:—The facts out of which this appeal arises are shortly as follows: The respondent association, having granted to one Patrick Moran, a policy assurance on his life for £ 5,000 with profits, re-insured his life with the appellant society for the same amount without profits, the liability of the re-insurers being expressly limited to what was paid (irrespective of bonus additions) under the original policy. Patrick Moran died, and the respondent association, having, notwithstanding the protest of the appellant society, paid to his legal personal representative the sum of £ 5,000, sued the appellant society for that amount under the policy of re-insurance. The appellant society contended that its liability under the policy of re-insurance, as also the liability of the respondent association under the original policy, was conditional on the truth of certain statements made by Patrick Moran when he effected the original policy, and that these statements were false, and false to his knowledge. The respondent association put the falseness of these statements in issue, and further alleged that whether these statements in question were true or false it had acted reasonably and in good faith in admitting and settling the claim on the original policy, and that the appellant society was under the terms of the policy of re-insurance bound by such settlement and could not rely on the untruth of the statements in question. The action was tried before the Chief Justice of Victoria and a special jury. The jury found the statements in question to have been false, and false to the knowledge of Patrick Moran, but they also found that the respondent association in settling the claim on the original policy acted reasonably and in good faith and in the honest exercise of its discretion to settle such claims so as to bind the appellant society, if it in fact had any such

discretion. On these findings the Chief Justice dismissed the action, holding that on the true construction of the policy of re-insurance the liability of the appellant society was conditional on the truth of the statements which the jury had found to be false, and that the appellant society was not bound by the settlement effected by the respondent association of the claim against it on the original policy. On appeal the Full Court of Victoria by a majority reversed the decision of the Chief Justice, and directed judgment to be entered for the respondent association for the amount claimed. The High Court of Australia by a majority confirmed the decision of the Full Court, and the appellant society is by special leave appealing from the order of the High Court. The result of the appeal depends entirely on the construction to be placed on the two policies and in particular on the policy of re-insurance. Their Lordships will therefore proceed to examine the terms of these documents in greater detail.

The original policy was, dated 2nd January, 1908. It recited that the assured had lodged with the respondent association a proposal and declaration and had made a personal statement to a medical officer of that association, which proposal declaration, and personal statement formed the basis of this contract. By the operative part of the policy the respondent association contracted to pay the sum assured or the other moneys payable thereunder within one calendar month after the death of the assured, with a proviso postponing payment until such proof of the identity of the claimant, the validity of the claim, and the age of the assured as the Directors should consider necessary had been deposited with the association. The policy contained a clause to the effect that the policy should be avoided and all moneys paid thereunder forfeited to the association in any of the events therein specified, that is to say, (a) if any premium should be unpaid for thirty days after it became payable, but so that if the policy had a surrender value such surrender value should be applied by the Directors in payment of the premium in arrear; (b) if the proposal or any document on the faith of which the policy was granted contained any untrue statement, or if the person making the proposal had with a view to obtaining the policy made any

false statement or been guilty of any concealment or misrepresentation; and (c) if the person assured committed suicide within thirteen months from the date of the policy with a proviso for the protection of *bona fide* assigns for value. The policy also contained a clause reducing the sum assured and the amount payable in respect of profits, if the age of the assured had been understated.

It is not and, in their Lordships' opinion, having regard to the principle laid down in *Thomson v. Weems* (1) could not be disputed that under this policy the liability of the respondent association was conditional on the truth of every statement of fact contained in the several documents made the basis of the contract except the statement as to the age of the assured, with regard to which special provision was made. The assured had, as a matter of fact, made two personal statements, one to Dr. Stokes and one to Dr. Warren, each of these gentlemen being a medical officer of the respondent association. Both statements were substantially to the same effect and one of them (it does not matter which) is no doubt the statement referred to in the policy.

The policy of re-insurance was, dated 29th January, 1908. It recited that the respondent association having an interest in the life of the assured had, by a proposal and declaration, dated 2nd January, 1908, applied to the appellant society to have such life assured in the appellant society by effecting a policy on such life payable within one month after proof of the death of the assured. It also contained a recital that the statements contained in the proposal and declaration, together with the statements contained in the personal statements made to Doctors Stokes and Warren already referred to, were the basis of the contract, and were to be deemed to be part thereof and incorporated therewith. It further contained a recital that the appellant society had agreed to accept the proposal of the respondent association. By the operative part of the policy the appellant society contracted that in the event of the death of the assured while the premiums under the policy were duly paid the society would pay to the association the sum of

£ 5,000. With one calendar month after such evidence as the board of directors of the appellant society might consider necessary to establish the age, identity and death of the assured had been supplied to the society. It was provided that under no circumstances should the amount payable by the society exceed that paid by the association under the original policy irrespective of any amount payable thereunder by way of bonus.

Apart from any inference to the contrary to be drawn from the recital that the appellant society had agreed to accept the proposal of the respondent association, it was not, and indeed, it could not be, disputed that the liability of the appellant society under the policy of re-insurance was conditional on the truth of the statements made the basis of the contract. Further, apart from any effect to be attributed to this recital the terms of the policy of re-insurance differ in almost every particular from the terms of the original policy. The basic conditions are different. The premiums are different. The original policy allows but the policy of re-insurance does not allow, a period of grace for the payment of premiums. The moneys assured differ in amount and are payable at different dates. The persons to determine the sufficiency of the evidence as to the age, identity, and death of the assured are different. The original policy contains a number of special provisions which are not contained in the policy of re-insurance. Everything therefore points to the policy of re-insurance being an independent contract of assurance rather than a contract of indemnity. Even the provision limiting liability under the policy of re-insurance to the amount paid, under the original policy would be unnecessary if the contract were one of indemnity only. It is in their Lordships' opinion important to remember all this in considering the effect of the recital last referred to.

It was admitted by the appellant society in the pleadings, and assumed throughout the proceedings in the Courts below and in the arguments before their Lordships' Board, that the effect of this recital was to incorporate in the policy all the terms of the proposal for re-insurance dated 2nd January, 1908. Their Lordships are not satisfied that the recital has any such effect. The recital

(1) 9 App. Cas. 671.

may very well mean that the directors of the society have determined to accede to the application of the respondent society for a policy of re-insurance, leaving the terms on which such policy was granted to be specified in the ordinary way in the policy itself. According to the preceding recital the policy is to incorporate the statements contained in the proposal and not the proposal itself. Having regard, however, to the admission in the pleadings, their Lordships will assume that the recital has the effect of incorporating in the contract the terms and conditions of the document of 2nd January, 1908.

The document of 2nd January, 1908, contains the following clause:—

"It is understood that in accepting the risk under this re assurance, the *Australian Widows' Fund Life Assurance Society, Limited*," (i.e., the appellant society) "does so on the same terms and conditions as those on which the National Mutual Life Association of Australasia Limited," (i.e., the respondent association) "have granted a policy and by whom, in the event of claim, the settlement will be made."

Suppose then that this clause had actually been repeated in the policy itself, what would be its effect? As already pointed out, the expressed terms of the policy of re-assurance are in almost every respect different from the terms of the original policy. It would be contrary to all sound canons of construction to reject or modify the expressed terms of the policy in order that it might be made to conform to the general words of the clause in question. Such a clause would almost necessarily be construed as if it were prefaced with the words "except as herein otherwise provided." It would be only less difficult to maintain that the effect of the clause was to introduce into the policy of re-insurance provisions relating to (a) application of surrender value towards payment of premiums in arrear, or (b) forfeiture of premiums already paid, if the basic conditions of the contract were not fulfilled, or (c) the allowance of days of grace. But it is enough to say that the incorporation in the policy of the clause in question cannot be allowed to contradict the express provisions of the policy. And yet this is in reality exactly what the respondent association contends for and exactly what has been allowed in the High Court of Australia and the Full Court of Victoria.

The somewhat ambiguous words "by whom in the event of claim the settlement will be made" are construed as meaning that if the respondent association acting reasonably and in good faith admit, and settle, its own liability under the original policy, the appellant society is bound by that admission and settlement, and is liable under its own independent contract of re-insurance notwithstanding the fact that, according to the express terms of such contract, no liability has in fact arisen. Sir Samuel Griffith, C. J., appears to have been fully aware of the difficulty involved in so construing and giving effect to the words in question, and he endeavours to meet this difficulty in the following way: In his opinion, although the *prima facie* meaning of the clause which makes the statements which the jury found to be false the basis of the contract is to make the liability of the appellant society conditional on the truth of those statements, yet this *prima facie* meaning is controlled by the incorporation in the policy of the clause contained in the document of 2nd January, 1908. In reality, he says, it is not the truth of the statements which is made the basis of the contract but the fact that the statements were made, so that there is no contradiction of any express term of the contract in giving to the incorporated clause the effect for which the respondent association contends. The policy is no longer an independent contract but a contract of indemnity in which it would be quite reasonable to insert a provision making any *bona fide* settlement effected by the respondent association binding on the appellant society. Their Lordships do not dissent from the proposition that if the clause of the policy, which defines the basis of the contract could be so construed, the difficulty would be considerably diminished, if not altogether obviated. But in their opinion it is impossible to hold that the perfectly clear provision as to the basic conditions, and indeed, the whole tenor of the contract, should be so profoundly altered, by the terms of a clause which is incorporated by reference, which is in itself ambiguous, and may have been inserted with a totally different intention as for example in order to make an agreement between the respondent association and the legal personal

representative of the deceased as to the amount due when the liability was undisputed binding on the appellant society, or in order to preclude interference by the appellant society between the respondent society and its own customer.

In their Lordships' opinion, having regard to the facts found by the jury, the appellant society is not and never was liable on the policy of re-insurance, and they will therefore humbly advise His Majesty that the appeal should be allowed, that the orders of the High Court and of the Full Court of Victoria should be discharged, and the judgment of the Chief Justice of Victoria should be restored, and that the respondent association ought to pay the costs of this appeal and the costs in the Courts below.

T. S. N. AND S. A. R. *Appeal allowed.*

Solicitors for Appellants—Lee Ockerby and Everington.

Solicitors for Respondents—Oliver and Lyall.

A. I. R. 1914 Privy Council.

(FROM BRITISH COLUMBIA).

16th June, 1914.

LORDS DUNEDIN, MOULTON,
PARKER OF WADDINGTON, SUMNER
AND SIR GEORGE FARWELL.

British Columbia Electric Railway Company Limited—Appellants

v.

Violet Gentile—Respondent.

On Appeal from the Court of Appeal of British Columbia.

**** Tort—Suit for damages for death of a person—Under Br. Columbia Families Compensation Act as well as under Lord Campbell's Act (Fatal Accidents Act 1846 of the United Kingdom) cause of action is different from that which deceased would have had if alive—S. 60 of consolidated Railways Act, prescribing a six months' time limit for suits for damage caused by tramway, etc. does not apply to such suits but applies only to suits by which the injured person himself has a cause of action—But the cause of action in suits under Family Compensation Act or Lord Campbell's Act can be extinguished by act of deceased, except where fraud has induced his act.**

The appellants were a Tramway Company empowered by British Columbia Act, 1896 to work Tramways in the city of Vancouver. The Respondent was the administratrix of V. deceased who was struck and killed by one of the appel-

lant's cars on 7th October, 1911 and brought this suit on 10th June, 1912 on behalf of the parents of the deceased under the Families Compensation Act of British Columbia, which is practically in the same terms as Lord Campbell's Act (Fatal Accidents Act, 1846). Actions under this Act should be commenced within twelve calendar months from the death of the deceased. Section 60 of the Consolidated Railways Act however provided a six months period from the time when the damage is sustained for suits for any damage or injury sustained by reason of the Tramway or Railway or the works or operation of the company."

Held, The cause of action under the Families Compensation Act is different from the cause of action which the deceased person would have had if he had lived to which alone Section 60 of the Railways Act applied and the suit was therefore not barred.

Their Lordships assumed without deciding that the expression "Operations of the company" in Section 60 of the Consolidated Railways Act includes negligent driving of a car.

"Indemnity" in Section 60 means indemnity to the plaintiff in the suit, in respect of wrong done to and damages sustained by him owing to the railway or operations of the company. A suit under the Families Compensation Act is not a suit for indemnity for damages within Section 60.

[P. 225, C. 2.]

The Fatal Accidents Act, 1846 of the United Kingdom, as well as the Families Compensation Act, of British Columbia gives a right of action to the representative of the deceased totally different and based on different principles from that which the deceased would have had if he had survived, and does not transfer the right of action of the deceased; *Blake v. Midland Ry. Co.* 18 Q.B. 93. *Pym v. Great Northern Ry. Co.*, 4 B. & S. 396. *Seward v. Owners of Vera Cruz* 10 A.C. 59—Referred to. *Markey v. Tolworth Joint Isolation Hospital District Board*—(1900) 2 Q.B. 454—Disapproved.

The *punctum temporis* at which the test is to be taken is at the moment of death, with the idea fictionally that death has not taken place. If therefore the deceased could not, had he survived at the moment of death, successfully maintained the action either because he had already been compensated and discharged all claims or covenanted away his rights, the suit under the Act does not arise. *Read v. Great Eastern Ry. Co.*, L.R. 3 Q.B. 555; *Griffiths v. Earl of Dudley*, 9 Q.B. D. 357.—Referred to. *British Columbia Electric Ry. Co. v. Turner*, 48 Can. S.A.R. 470—Approved.

[P. 226, C. 1.]

Dicta in *Green v. Br Columbia Electric Railway Co.*, 12 Br. Col. Rep. 199 partly Disapproved.

There is no satisfactory ground of distinction between the extinguishment of a cause of action by the injured man by an accord and satisfaction, evidenced by a release and its extinction by the recovery of a judgment upon it or the expiry of the period of limitation. *Williams v. Mersey Docks*—(1905) 1 K.B. 804—Approved.

But the raisers of an action under the Families Compensation Act are entitled to set aside a release obtained from a deceased man by fraud,

British Columbia Electric Ry. Co. v. Turner,
48 Can. S. R. 470—Approved.

Clauson and Branson—for Appellants.

E. P. Davis and M. Macnaghten—for Respondent.

Lord Dunedin:—The appellants are a company working the tramways in the streets of the city of Vancouver. This they do as assignees of the Consolidated Railway Company incorporated by Chapter 55 of the Acts of British Columbia, 1896. The respondent is the administratrix of Vernon Aldrich, deceased, who was struck and killed by one of the appellants' cars on 7th October, 1911.

The respondent raised action on behalf of the father and mother of the deceased on 10th June, 1912, in virtue of the provisions of the Families Compensation Act, Chapter 82 of the Revised Statutes of British Columbia. In the statement of claim the plaintiff averred that the death of Vernon Aldrich was caused by the negligence of the servants of the defendants.

The defendants denied negligence and joined issue on the fact. They also pleaded that the action was barred, not having been commenced within six months of the death of the deceased. This plea they rested on the terms of Section 60 of the Consolidated Railway Act, which is in the following terms:—

"All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage is sustained, or, if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act."

The case came before a jury. The learned Judge repelled the plea founded upon Section 60 and the jury found a verdict for the plaintiff and assessed damages at \$ 3,000, which sum the Judge then directed should be paid, \$ 2,000 to the father and \$ 1,000 to the mother of the deceased man.

The defendants appealed to the Court of Appeal, repeating their plea founded on Section 60, and further contending that the verdict was contrary to evidence. The Court of Appeal affirmed the judg-

ment of the Court below, but granted leave to appeal to this Board. The question of the verdict being contrary to the evidence was not argued before, and would not have been entertained by their Lordships. The whole question is, therefore, whether the action was barred as being raised too late.

To get the benefit of the limitation expressed in Section 60, the appellants must shew that the present suit is one for "indemnity for damages sustained by reason of the railway or the operations of the company." Indemnity obviously means indemnity to the plaintiff in the suit, in respect of wrong done to the plaintiff and damages sustained by him owing to the railway or the operations of the company. Their Lordships assume without deciding that the words "operations of the company" include negligent driving of a car.

The question therefore comes to turn on whether a suit raised in virtue of the provisions of the Families Compensation Act answers to the description above set forth.

The Families Compensation Act is for all practical purposes textually the same as the Act known as Lord Campbell's Act in the United Kingdom, of which Act it is indeed a copy. Now the character of the right given by Lord Campbell's Act has been the subject of much judicial decision. As early as 1852, in the case of *Blake v. Midland Railway Company* (1), Coleridge, J., giving the judgment of the Court, said:

"But it will be evident that this Act does not transfer this right of action (of the deceased) to his representative, but gives to the representative a totally new right of action, on different principles."

Then in the case of *Pym v. Great Northern Railway Company* (2) Erle, C. J., said:

"The statute as appears to me gives to the personal representative a cause of action beyond that which the deceased would have if he had survived, and based on a different principle."

In his judgment Williams and Willes, JJ. and Baron Bramwell and Baron Channell concurred. And, finally, in the case of *Seward v. Vera Cruz (Owners of)* (3) Lord Selborne, L. C., says:

(1) 18 Q. B. 93.

(2) 4 B. & S. 396.

(3) 10 App. Cas. 59

"Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim '*actio personalis moritur cum persona*' because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor."

And Lord Blackburn says:

"I think that when that Act, 'Lord Campbell's Act,' is looked at, it is plain enough that if a person dies under the circumstances mentioned, when he might have maintained an action if it had been for an injury to himself which he had survived, a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which, as is pointed out in *Pym v. Great Northern Railway Company* (2), is new in its species, new in its quality, new in its principle, in every way new."

These *dicta* are in their Lordships' opinion directly applicable to the Families Compensation Act. It follows that, in their opinion, a suit brought under the provisions of that Act is not a suit for indemnity for damage or injury sustained by the plaintiff by reason of the operations of the defendants, and that Section 60 has no application. They do not agree with the reasoning of or the result arrived at in the case of *Markey v. Tolworth Joint Isolation Hospital District Board* (4), which they consider directly in conflict with the law as laid down in the *Vera Cruz Case* (3) in the House of Lords. This, however, does not end the matter, for although the action under Lord Campbell's Act or an Families Compensation Act is not an action of indemnity for negligence, yet nevertheless it is an action which can only exist if certain conditions precedent are fulfilled. The first is that the death shall have been caused by wrongful act, neglect, or default of the defendants. That has in this case been affirmed by the verdict of the jury. The second is that the default is such "as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof."

Their Lordships are of opinion that the *punctum temporis* at which the test is to be taken is at the moment of death, with the idea fictionally that death has not taken place. At that moment, however, the test is absolute. If, therefore, the deceased could not, had he survived at that moment, maintained, *i.e.*, successfully maintained,

his action, then the action under the Act does not arise. Therefore when the deceased had already been compensated and discharged all claims (*Read v. Great Eastern Railway Company* (5)), or had covenanted away his rights *Griffiths v. Earl of Dudley* (6), he was not in a position to "maintain an action." This is the ground on which Blackburn J. (as he then was) in the former case expressly puts his judgment. Their Lordships feel bound to add that, in their opinion the remark which follows has been misunderstood. Blackburn, J. after commenting on Section 1, goes on to say that Section 2 does not give a "new right of action." That means in law beyond what is given by Section 1. But it has been interpreted in a wider sense by Field and Cave, JJ. in *Griffiths' Case* (6). That this is erroneous is best appreciated by remembering that Lord Blackburn himself used the emphatic words quoted above in the *Vera Cruz Case* (3) sixteen years after he pronounced the judgment in *Read v. Great Eastern Railway Company* (5), and that when the erroneous view of the latter case was urged in argument he quoted the words above cited from the older case of *Pym v. Great Northern Railway Company* (2).

It follows from what their Lordships have said that the *dicta* in the case of *Green v. British Columbia Electric Railway Company* (7), cannot be supported in their entirety. Since that case was decided, however, the case of *British Columbia Electric Railway Company v. Turner* (8), has been decided by the Supreme Court of Canada, and their Lordships have been furnished with transcript of the judgments. The views of the learned judges—subject to one point to be presently noticed—seem to their Lordships in accordance with the views now expressed. The learned Chief Justice says specially of the action,

"In one sense it is a new action, but the condition subject to which that right of action may be exercised, being that the deceased did not receive indemnity or satisfaction during his lifetime to that extent, and in that respect it is a representative or derivative action."

The other judges base their opinion on the same view, although they partly also

(4) [1900] 2 Q. B. 454.

(5) L. R. 3 Q. B. 555.

(6) 9 Q. B. D. 357.

(7) 12 Brit. Col. Rep. 199.

(8) 48 Can. S.C.R. 470.

go on the view expressed in *Green's case* (7). In the only point of difference between them their Lordships agree with the view expressed by Mr. Justice Anglin. That learned Judge says:

"I find no satisfactory ground of distinction between the extinguishment of the cause of action by the injured man by an accord and satisfaction, evidenced by a release, and its extinguishment by the recovery of a judgment upon it or the expiry of a period of limitation."

In their Lordships' view this is correct, and the case of *Williams v. Mersey Docks* (9), was rightly decided. As to the case of *British Columbia Electric Railway Company v. Turner* (8), it is scarcely necessary to add that their Lordships are in entire accordance with the view there given effect to, namely, that the raisers of the action under the Families Compensation Act have a title to set aside a release obtained from the deceased man by fraud.

Applying these views to the facts of the case the deceased man had at the moment of his death in no way forfeited or parted with the right of action competent to him for the injury done him. His death took place and the action on the part of the respondent sprang into being. It was raised within twelve months after the death and is therefore competent.

The result is that in their Lordships' opinion the decision of the Court below was correct, and they will humbly advise His Majesty to dismiss the appeal with costs.

T. A. *Appeal dismissed.*

Solicitors for Appellants — Addison, Linklater and Brown.

Solicitors for Respondent — Armitage, Chapple and Macnaghten.

(9) [1905] 1 K.B. 804.

A. I. R. 1914 Privy Council.

(FROM CANADA.)

23rd July, 1914.

VISCOUNT HALDANE L.C., LORDS
DUNEDIN, MOULTON, PARKER OF
WADDINGTON, SUMNER, AND
SIR GEORGE FARWELL.

Levine—Appellant

v.

Serling—Respondent.

On Appeal from the Supreme Court of
Canada.

Privy Council—Order for leave to appeal in *forma pauperis* takes effect from its date.

The practice of the Board as to the date from which an order for leave to appeal in *forma pauperis* takes effect is the same as that of the High Court that is, it takes effect only from the date on which it is made and has no effect on costs incurred before that date. [P. 227, C. 2.]

Geoffrey Lawrence and *P. Ledieu*—for Appellant.

H. O. Dauchwerts, Smith and *G. Williamson*—for Respondent.

Lord Moulton :—Their Lordships have examined the authorities as to the practice of this Board with regard to the date from which an order for leave to appeal in *forma pauperis* takes effect, and they are clearly of opinion that the settled practice is the same as that of the High Court, namely, that the order takes effect only from the date at which it is made, and has no effect whatever on costs incurred before that date.

The application, therefore, that the costs of the petition for special leave to appeal in *forma pauperis* may be taxed upon the pauper scale, must be dismissed, but there will be no costs of the application.

T. S. N. *Application rejected.*

Solicitors for Appellant—Blake and Redden.

Solicitors for Respondent—Lawrence Jones and Co.

A. I. R. 1914 Privy Council.

(FROM CANADA).

4th August, 1914.

VISCOUNT HALDANE, L.C., LORDS
MOULTON AND SUMNER.

City of Halifax—Appellants

v.

Nova Scotia Car Works, Limited—Respondents.

On Appeal from the Supreme Court of
Canada.

Taxation (Municipal)—Exemption from, under an agreement with the city (Halifax) which received Legislative sanction as the Schedule of a Special Act—Contribution paid towards the charges of a sewer constructed by the city—Is taxation though it is a charge for benefit conferred and is not recurring like other taxes.

Under an agreement with the appellants sanctioned by the Legislature as a Schedule to a Special Act, the respondents had got exemption for the period of ten years from taxation. The

City (appellants) constructed public sewers and demanded contribution from the respondents.

Held, that contribution paid towards the cost of public sewers is presumed to be a tax and the appellants must rebut this presumption if they are to succeed. The fact that this charge resembles the price of benefits conferred does not differentiate it from tax, for all rates and taxes are supposed to be expended for the benefit of those who pay them. The distinction in the city charter between "taxation" and "execution of city works" does not rebut the presumption. Again the charter is inapplicable to this case as the schedule to the special Act does not refer to the charter. Also it is under a Special Act the respondents claim the exemption and the City charter Section 335 (1) (i) recognises such an exemption.

[P. 229, C. 2 & P. 230, C. 1.]

R. Finlay, F.H. Bell and Geoffrey Lawrence—for Appellants.

P. O. Lawrence and E. P. Allison—for Respondents.

Lord Sumner:—The respondents own a manufactory in Halifax, Nova Scotia, situated in four streets. In 1908, 1910, and 1911 the city of Halifax made public sewers in these streets under the city charter, and under its 600th section required the respondents, as owners of land and buildings fronting the sewers, to pay \$2387.34 towards the costs of their construction. If the respondents are in the position of an ordinary rate-payer, that sum is due and constitutes a lien on their lands under Section 603 of the charter. The question is, in the words of paragraph 15 of the case stated for the opinion of the Supreme Court of Nova Scotia, "does the exemption claimed by the defendant apply in respect to the sewers," or, put in another form, is this charge "taxation on the company's buildings...and on the land on which its buildings used for manufacturing purposes are situated?"

The Silliker Car Company was incorporated in 1907. The Nova Scotia Car Works, Limited, now respondents, are assignees of its manufactory and entitled to its rights and exemptions. For present purposes no distinction need be drawn between them. Both alike may be referred to as "the company." The city of Halifax has power, under Section 344 (1) of its charter, "when any company proposes to purchase any land or erect any building in the city of Halifax for the purpose of establishing any manufacturing industry," to "wholly or in part exempt the land and buildings...of such company from taxation for the general purposes of the city other than water rates

for a period not to exceed ten years from the establishment of such industry." The company did propose to purchase land and erect buildings, but the city of Halifax was minded to do more than merely to apply this section, and an agreement was negotiated between the city and the company, which, in the form of a schedule to a special Act, received legislative sanction on 25th April, 1907. Under this agreement and the Act the city was to lend the company \$125,000, to grant it an exemption from taxation for ten years, and to limit the yearly assessable value of its property during the second ten years to an agreed sum. As the consideration for this assistance the company agreed to establish a manufactory in Halifax, and this has been done.

The actual terms of the exemption thus specially enacted are as follows:

"The city will grant the company a total exemption from taxation for ten years on its buildings, plant and stock, and on the land on which its buildings used for manufacturing purposes are situated...At the expiry of the ten years the city agrees that the total yearly value for assessment on such lands, buildings, plant and stock shall, for a further period of ten years, not exceed fifty thousand dollars, the foregoing exemption not to apply to the ordinary water rate for fire protection, nor to the rate for water used by the Company, which shall be charged at the minimum rate charged on other manufacturing concerns."

So far as a simple question of interpretation is affected by presumptions at all, their Lordships are of opinion that this clause should be construed favourably to the respondents. They have performed the whole consideration on their side by establishing their works, and the consideration moving to them has been earned and ought not to be thereafter restricted. The matter is one of bargain and of mutual advantage; it is not a case of one citizen seeking to escape from his share of common burthens and so increasing *pro tanto* the burthen on the others. In the case of *La Cite de Montreal v. Les Ecclesiastiques du Seminaire de S. Sulpice de Montreal* (1) Lord Watson, speaking of an exemption from "municipal and school taxes," or "*cotisations municipales et scolaires*," says of a district rate for drainage improvements, "*prima facie* their Lordships see no reason to suppose that rates levied for improvements of that kind are not Municipal taxes." It will be observed that

(1) 14 App. Cas. 660.

this was a case of exempting a certain class of rate-paying bodies—namely, educational institutions—on public grounds. Hence what Lord Watson says applies *a fortiori* in the present case of a particular bargain. It is true that all that was decided by that judgment was that leave to appeal should not be given, but their Lordships had taken time to consider it, and this *dictum* given in the course of it, is of great weight in the present case.

But apart from this their Lordships think that *prima facie* the exemption covers the charge in question. Put shortly, the appellants' argument must be, this liability "to pay to the city, towards the cost of construction of such sewer, the sum of one dollar and twenty-five cents for each lineal foot of property so fronting," is not "taxation on buildings or on the land" on which the buildings are situated. If it is not taxation, what else is it? No doubt other words may be found to describe it aptly, but the word "taxation" covers it too. Even in England, where the expression "rates and taxes" sometimes is used as if it connoted the distinction between national and local imports, "tax" and "taxation" are words familiarly used in this connection. The Sewers Act, 1841, for example, authorizes commissioners of sewers to levy a "general sewers tax" for construction and upkeep of sewers, and this tax is included with other taxes and with rates in the returns required by the Local Taxation Returns Acts, 1860 and 1870.

It is therefore, incumbent upon the appellants to rebut this presumption, and to limit this exemption so that the liability in question will fall outside it. Three things are relied on the nature of the charge, the terms of the charter, and the context of the clause.

In a sense it is true that the charge resembles the price of benefits conferred if not of work and labour done. The contribution is kept down to \$ 1.25 per foot of frontage apparently to discriminate between the local benefit to property owners in the street and the general benefit to the city at large. This does not carry the matter far. All rates and taxes are supposed to be expended for the benefit of those who pay them, and some really are so, but the essence of taxation is that it is imposed by superior authority without

the taxpayer's consent, except in so far as representative government operates by the consent of the governed. Compulsion is an essential feature of the charge in question. The respondents might have drained their factory for themselves; they might think that it needed no drainage; they might object to the Municipal scheme as defective; but the city sewers would be laid and the respondents would have to pay just the same. There is not enough here to differentiate this charge from "taxation."

What is relied on in the terms of the charter is that, alike in the headings of parts of the Act, in the arrangement of the sections themselves, and in the language employed, the charter seems to distinguish between "taxation" and the "execution of city works"; that "taxation" is a matter of valuation, assessment, and rate-books, and is subject to exemptions in favour of the Crown and of those who enjoy the benefit of grants of exemption from the city or exemption by special Act, while execution of works of sewerage is treated as a specific city service, and is followed by an apportionment by the city engineer, not by the assessors, which is in proportion to linear frontage and not based on annual value. Its cost is a capital and not a recurring charge, and the remedies given are to be pursued in the like manner as remedies for rates and taxes, as though the charge was not either a rate or a tax, but only like them. Many sections were invoked as shewing this contrast; they do shew it and need not be enumerated here.

Their Lordships are by no means satisfied that criticism of this sort would suffice to rebut the *prima facie* meaning of "taxation." The arrangement of the sections and the headings of the different parts of the Act are matters of orderly arrangement and convenience not directed to the present point but adopted *alio intuitu*. The charge is a capital instead of being a recurring charge, not because it is not a tax but because it is not a recurring tax; for a sewer, if once well laid, should last some considerable time. To say that the charge may be enforced as taxes are enforced is a condensed reference to procedure without necessarily meaning that the charge is not a tax but only something like it. There is, however, another short answer to this kind of

reasoning. The agreement scheduled to the special Act does not expressly refer to the charter, nor is any such reference implied or involved. It provides for help to the company much beyond what the charter provided for. It is really independent of the charter. The company is not to pay any taxes at all; what does it matter, for the purpose of the exempting agreement, what powers the city has, or when, or how, or in what terms they can be exercised? The company has nothing to do with them; why should its privilege, for which it has given the agreed consideration, be limited by reference to powers and provisions which cannot be used to its prejudice? Reference to the charter would only be necessary if the agreement had bound the company to pay such taxes as the city might lawfully impose.

The third point turns on the latter words of the clause of exemption. First, limiting the annual valuation to \$ 50,000 during the second ten years is supposed to shew that the exemption during the first ten was merely such as might have been effected by saying that the annual valuation on which the company should be taxed should be *nil*. Their Lordships can only say that this argument seems too shadowy to be of any service. In fact, the provision for the second ten years may not amount to an effective exemption at all. Secondly, the exemption is not to apply to ordinary water rates for fire protection or to the rates for water used by the company. These words are quite consistent with a wide sense of "taxation." These two rates can only be taken out of the exemption by naming them. How does naming them shew that the exempted taxation is *ejusdem generis* with water rates alone? If the exemption enjoyed by the company had been only one which the charter empowered the city to grant by Section 344, or only that which is referred to in Section 335, it would by Section 362 (3) have stopped short of exempting it from charges for sewers or other betterments, but it is an exemption under a special Act, and the charter anticipates that such exemptions may occur, and provides *ex abundanti cautela* that among things wholly free from taxation shall be (Section 335 (1) (i)) "the property of any corporation exempted from civic taxation

under any special Act as therein provided." Accordingly it is the provision in the special Act that is in this case the clause in the agreement scheduled to the special Act that must govern. That clause simply provides that the company is to be exempt from taxation and is to pay water rates, not that it is to pay water rates but no other taxation.

Their Lordships are of opinion that these considerations do not, either singly or in the aggregate, meet the *prima facie* meaning of the words of exemption, and that taken as they stand they cover the liability in dispute. They therefore think that the Supreme Court of Nova Scotia was wrong in answering the question put in the case stated in the negative, and that the order appealed from, namely, that of the Supreme Court of Canada which reversed that decision and answered the question in the affirmative, was right and should be affirmed. They will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

T. S. N.

Appeal dismissed.

Solicitors for Appellants — Lumley & Lumley.

Solicitors for Respondents — Blake & Redden.

**** A. I. R. 1914 Privy Council.**
(FROM AUSTRALIA).

24th July, 1914.

EARL LOREBURN, LORDS DUNEDIN,
ATKINSON, SUMNER, SIR JOSHUA
WILLIAMS AND SIR ARTHUR CHANNEL.

Commissioner of Taxes—Appellant

v.

The Melbourne Trust, Limited—Respondent.

On appeal from the High Court of Australia.

**** (a) Income-Tax—Company taking over the assets and liabilities of certain other companies that were being wound up—Assets taken at a particular valuation—The difference between the actual price realised of an asset and the figure at which that asset stood considered as a gain of the company—The company is a trading company and not a mere realization company and this gain is assessable to income-tax.**

Three Banks went into liquidation in Australia. Three Companies were formed and each took up the assets and liabilities of one Bank and gave the creditors paid-up shares and redeemable debenture

stock in lieu of their debts. After all the debenture stock was redeemed the respondent Company was formed and it took up all the assets and liabilities of all these three Companies the assets being taken at a particular valuation and gave the share-holders debenture stock and paid-up shares in lieu of their old shares. The respondent Company also redeemed all its debentured stock and treated the difference between the realised value of an asset and that at which it stood as its gains in its books of account.

Held that the shareholders of the respondent Company consisting also of people who were not creditors of the three insolvent Banks and the securities being held for the benefit of all the shareholders, the object of the company was to hold and nurse the securities it held and to sell them at a profit when convenient occasion presented itself. Hence the company is a trading Company and its profits are assessable to income-tax.

California Copper Syndicate v. Harris 5 Tax Cases 159 referred and applied.

“(b) *Income-Tax—Profit—Is earned when it is dealt with as profit.*

Any surplus obtained of the proceeds of the asset over the consideration paid by way of purchase-money having been dealt with as profit by the Company must be considered as profit and assessed to income-tax.

R. Finlay, Micklethwait and W. A. Barton—for Appellants.

Clauson and A. M. Latter—for Respondents.

Lord Dunedin:—The Commissioner of Taxes for the State of Victoria assessed the respondent company for income tax in respect of the year 1910 upon the sum of £113,998, being the sum which in his judgment upon the figures appearing in the balance-sheet and report of directors of the said company, dated 9th April, 1910, fell to be assessed under the Income Tax Acts. The respondent company objected to the assessment in so far as it was levied upon the sums of £104,782-1s. 4d. and £509-1s., which sums were admittedly included in the above-mentioned sum of £113,998. What these sums were in respect of which objection was taken will be presently explained. The Commissioner of Taxes, at the request of the respondent company, stated a special case for the opinion of the Supreme Court of Victoria.

The questions for the opinion of the Supreme Court as put were:—

“(1) Whether the surplus of £104,782-1s. 4d. mentioned in paragraphs 19 and 22 of this case is profits earned in or derived in or from Victoria by the new company, the respondents during the year 1909 or previous years within the meaning of Section 9 of Act No. 1819 so as to subject

the new *i.e.*, the respondent company to income tax in respect thereof?

“(2) Whether the difference of £509 1s. between the prices of debenture stock and par mentioned in paragraphs 19 and 22 of this case is profits of the kind mentioned in question (1)?”

The Supreme Court, by a majority of two to one, decided in favour of the Commissioner of Taxes, answering the questions put as follows:

“(1) The surplus of £104,782 1s. 4d. mentioned in paragraphs 19 and 22 of the said case is profits earned in or derived in or from Victoria by a company during the year 1909 or previous years within the meaning of Section 9 of Act No. 1819 so as to subject the company to income tax in respect thereof?

“(2) The difference of £509 1s. between the prices of debenture stock and par mentioned in paragraphs 19 and 22 of the said case is also profits of the kind above mentioned so as to subject the company to income tax in respect thereof.”

An appeal was taken to the High Court of Australia, and that Court by a majority of two to one reversed the judgment of the Supreme Court of Victoria, and in lieu of the order pronounced by that Court declared “that neither of the sums mentioned in the said questions is taxable.”

From this judgment appeal is taken to their Lordships' Board.

It appears from what has been above stated that judicial opinion on the question has been strongly divided—three learned judges in all having been of one opinion and three of another. In such a state of matters it is not to be expected that the question should be one of easy solution, or that cogent arguments should not be found on both sides. Their Lordships recognize that fact, and have given careful and repeated consideration to the arguments addressed to them, and to the reasons put forward for their judgment by the learned judges of the Courts below. They will now state the result at which they have arrived.

To make the question intelligible it is necessary here to give as briefly as may be a history of the occurrences which led to the point arising.

Three Australian banks, namely, the English and Australian Mortgage Bank, Limited, the Federal Bank of Australia, Limited, and the City of Melbourne Bank, Limited were unable to satisfy their creditors, and went into liquidation. The shareholders had virtually no interest in the liquidations, as the assets were

avowedly insufficient to pay the creditors. Eventually in 1897 schemes of arrangement were sanctioned by the High Court in England and the Supreme Court in Victoria and, in the case of the second bank, also by the Courts of New South Wales and South Australia. In the case of each bank the scheme as affecting it sanctioned in England was identical with that sanctioned in Australia. In pursuance of the schemes of arrangement three companies were formed bearing the names of the English and Australian Assets Company, Limited, the Federal Assets Company, Limited, and the Melbourne Assets Company, Limited, respectively. In these companies the creditors of the respective banks were to receive in respect of their debts so much debenture stock and so many fully paid-up shares. The whole assets of each of the insolvent banks were transferred to the respective companies, and the liquidation of the banks was brought to an end.

The respective assets companies then proceeded gradually to realize the assets, and with the proceeds to pay off the debenture stock it, being by the terms of its creation a redeemable stock. During the whole of the life of these companies the shares and debenture stock were transferable, and some of the stock and shares were in fact but to an extent not accurately known transferred.

By the year 1903 the whole of the debenture stocks had been redeemed.

In 1903 the respondent company was formed. The object of the company was to acquire the undertakings of the three separate companies in terms of agreements which had been made by the promoters of the respondent company with the three companies. In terms of these agreements the whole of the assets of the three respective companies were to be handed over to the new company; the three companies were to be wound up, and the shareholders of the respective companies were in exchange for their shares to receive, in the case of the Melbourne Assets Company and the English and Australian Assets Company, cash, debenture stock, and shares; in the case of the Federal Assets Company, debenture stock and shares, all calculated at the rates set out, in the said agreements. This was done. The respondent

company then proceeded with the gradual realization of the massed assets, and applied various sums of the moneys so received in paying off its debenture stock. This was effected partly by buying their own stock in the market, and partly by redeeming the same, it being by the terms of its issue a redeemable stock. By 15th October, 1909, the whole of its debenture stock was paid off.

Their Lordships must now refer to the report and balance-sheet of 9th April, 1910, upon the terms of which the questions as put arise.

The balance-sheet is preceded by a profit and loss account. This account is framed on the ordinary lines of the profit and loss account of a going concern, and deals solely with the yearly revenue, deducting outgoings and expenses of the properties held by the company. It brings out a profit balance of £25,183 18 s. 2d. to be carried to the balance-sheet. But it takes no account whatever of sums received from assets realized.

Coming to the balance-sheet we find on the liabilities side shareholders' capital and creditors and sundry other liabilities stated in ordinary form. We then come to the following item, which is the matter for special attention: "Realization Reserve Account—Net surplus on realization to date (see paragraph 5 of directors' report), £1,44,765 9s. 8d. "Discount on purchases and cancellation of debenture stock, £3,943 5s. 6d." Then these two figures are summed and brought out at £1,48,708 15s. 2d. Turning now to the report there are to be found the following passages:—

"5. As the result of the year's operations the Realization Reserve Account (consisting largely of purchasers' balances) has been increased by the sum of £47,442 15s. 5d. making, with the amount brought forward from the previous year, a net surplus of £148,708 15s. 2d., on realizations and profits arising on purchase of debenture stock for cancellation."

"7. In the Profit and Loss Account no credit has been taken for accrued interest, rents or dividends of an estimated amount of £4150. After providing £1855 8s. 3d., for interest paid on the debenture stock, the net profit including the balance brought forward from the pre-

vious year, £2149 15s. 5d.
is ... 27,333 13 7

"The directors recommend that from this sum there be applied in payment of a dividend of fourpence per share (equivalent to slightly over 8 per cent.) free of income tax ... 22,777 15 4

"Leaving to be carried forward (subject to payment of income tax) ... 4,555 18 3

The whole of the debenture stock having been paid off and the share capital of the company, without taking into consideration the Realization Reserve Account, being fully represented by assets, the directors also recommend to the shareholders that a distribution by way of bonus of sixpence per share should be paid in cash out of that account.

£ s. d.
"The sum at credit of the Realization Reserve Account is ... 148,708 15 2
The bonus now recommended amounts to ... 34,166 13 0
Leaving at the credit of the Realization Reserve Account ... 114,542 2 2"

It is set forth in the special case that the assets of the three respective companies as taken over were entered at a valuation in the companies' books which reproduced a valuation made by the companies themselves four years before the transfer to the new company. As an individual asset came to be realized the difference between the actual price realized and the figure at which that asset stood was if it were a gain carried to a realization reserve account. It is also set forth that of the sum of £148,708 15s. 2d. mentioned in paragraph 7 of the report as above set forth, the sum of £104,782 1s. 4d. represents surplus on realization of assets in Victoria, and £509 1s. represents the difference between prices paid and par for their own debenture stock in Victoria.

It is not necessary to set forth the particular provisions of the Income Tax

Acts in force in Victoria. It is common ground that a company, if a trading company and making profit, is assessable to income tax for that profit. The argument for the respondent company can be stated in a single sentence. They say they were not a trading company but a realization company: that the realization was truly for the benefit of the original creditors of the three banks; that all shareholders in the company are either such original creditors or the assignees of such original creditors. If that is the true view of the situation their Lordships do not doubt that the argument must prevail. If the liquidator of one of the banks had made an estimate of the various assets held by him for realization, and then on realization had obtained more than that estimate, such surplus would not have been profit assessable to income tax.

Their Lordships cannot, however, come to the conclusion that this is the true view of the situation. It is not necessary to decide the question as it might have arisen in the case of the original three assets companies. At least at the inception of the present company it seems to their Lordships that all concerned were satisfied to discharge their old claims by accepting shares in a new venture, and that that new venture must then be looked at to see if profits assessable to income tax have been earned. The position may be tested in more ways than one. Were it a case of liquidation then the directors of the company would hold for the creditors of the old insolvent banks. They do not do so. They hold for the shareholders of the company; and the shareholders of the company comprise persons who never were creditors of the banks, but acquired their shares in open market. Again, if it was liquidation, the right of each participant creditor, or creditor's assignee, would be strictly limited to the assets of the bank of which he was a creditor or represented a creditor. If, for example, the Melbourne Bank, assets on realization turned out well, and the Federal Bank assets badly, the creditors of the one would benefit, and those of the other suffer. But as it is it is not so. Each shareholder has in respect of each share an equal interest in the proceeds of the massed assets which were originally assets of the three banks but now are

assets of the company. Holding, then, that the shareholders of this company are shareholders in an ordinary venture, the only question that remains is whether the surpluses realized represent profits. Their Lordships think that the principle is correctly stated in the Scottish case quoted, *California Copper Syndicate v. Harris*(1).

"It is quite a well settled principle in dealing with questions of assessment to income tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than that for which he originally acquired it, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 and is therefore not assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but is an act done in what is truly the carrying on, or carrying out, of a business."

In the present case the whole object of the company was to hold and nurse the securities which it held, and to sell them at a profit when convenient occasion presented itself.

Their Lordships therefore come to the conclusion that there is ample evidence here that the company is a trading company and that the surplus realized by it by selling the assets at enhanced prices is a surplus which is taxable as profit.

There remains, however, a difficulty as to proof of the exact figure. It does not seem to their Lordships that the mere fact that an investment standing in the books at x pounds realizes on sale $x + y$ pounds settles that a profit of y pounds has been made. It is not that their Lordships doubt that the initial figure in the books may be taken. These figures represent in their Lordships' view real values, for so the parties have treated them. It was argued that they were mere valuations. In one sense that is true, for, not being put to the test of the market at the moment, the only way to affix a value was by valuation. But that they represent real value seems certain because, unless they did, it would have been impossible to regulate justly the share which each member of the three assets companies was to get in the new mixed mass of assets—or in other words what shares and debentures he should get in the new company. But it is possible that other

investments on realization may shew loss instead of profit; and it is obvious that it is in the totality of the transactions that the question of profit comes to be fixed.

Their Lordships are, however, of opinion that the company may well be held bound by its own actions. In distributing a bonus of 6d. per share it affirmed that to that extent at least there was profit realized. In the same way in making a distribution of debenture stock on and after 10th August, 1910, they may be held to have distributed profit.

Section 9, sub-Section 1 of the Income Tax Act of 1903 is as follows: "9.—(1) So far as regards any company liable to pay tax, the income thereof chargeable with tax shall (except as provided in paragraph (g) of sub-Section (1) of Section 7 of the principal Act or as hereafter provided) be the profits earned in or derived in or from Victoria by such company during the year immediately preceding the year of assessment."

This question of time does not seem to have bulked in the discussion in the Courts below—indeed the form of the question—"during the year 1909 or preceding year" rather precludes it—but it has been very earnestly pressed upon their Lordships' attention.

As regards the question of when a profit is earned their Lordships' view is that a profit can be said to be earned when it is dealt with as a profit. In ordinary cases this synchronises with the realization of the sums which swell the assets of the person or company, and which entering the account (whether on the creditor or debtor side will depend on the particular account in view) go to bring out the balance which is deemed profit. But for the reasons already given their Lordships think that in a case like this the company are entitled to hold at least a part of their realizations in suspense—as indeed they have done in their accounts and that it is only when finally the same is given to the shareholders that the final impress of profit is, so to speak, stamped upon it, and therefore, for the purpose of the Act, that is the time at which it is earned.

Holding this view their Lordships will humbly advise His Majesty to allow the appeal and set aside the judgment appealed against, and also the judgment originally passed by the Supreme Court,

(1) [1904] 6 F. 894=5 Tax. Cases 159.

and remit the case to the Supreme Court with the following declarations :

1. Declare that the respondent company is so constituted and has so carried on its affairs that any surplus ascertained and realised of the proceeds of the assets companies over the consideration paid by way of purchase-money for them, after making all just deductions, would be profits taxable as income in the following year ; this being over and above any annual surplus of incomings over outgoings of the concern.

2. Declare that as regards the bonus of 6d. per share referred to in paragraph 7 of the directors' report of 9th April, 1910, there is evidence sufficient to shew that this is taxable as profit so far as it was earned in or derived from Victoria ; and that *pari va tione* the distribution of debenture stock to shareholders calculated as justified by the state of the realization reserve account should be property held to be taxable as profit according to the pecuniary value thereof.

3. Declare that the case does not state facts sufficient to determine any other questions either as to the amount of the profits or the years in which they are assessable.

4. Declare that the Commissioners be at liberty to apply to the Supreme Court for any inquiries and accounts that may be necessary.

5. Declare that neither party shall be entitled to costs.

There will be no costs to either party before this Board.

T. S. N.

Appeal allowed.

Solicitors for Appellant—Freshfields.

Solicitors for Respondents—Linklater, Addison and Brown.

**** A. I. R. 1914 Privy Council.**
(FROM VICTORIA.)

28th July, 1914.

LORDS DUNEDIN, ATKINSON,
SUMNER AND SIR JOSHUA
WILLIAMS.

Syme—Appellant

v.

Commissioner of Taxes—Respondent.

On appeal from the Supreme Court of
Victoria.

**** Income-tax—Trustees carrying on a newspaper concern on behalf of beneficiaries—Profits of the concern taxed in the hands of the beneficiary—Must be taxed only as income derived by him from personal exertion—S. 2 of the Income Tax Act, 1895 as amended by S. 4 of the Income Tax Act, 1896, S. 5 of Act of 1895.**

David Syme left certain specific legacies and gave the residue of his estate consisting of a newspaper concern to trustees. They were to conduct it for the benefit of several beneficiaries of whom the appellant was one. The profits of this concern in the hands of the appellant were taxed to income-tax as "income derived from the produce of property."

Held, that

(1) Section 2 of the Income Tax Act of 1895 read with Section 4 of the Income Tax Act of 1896 is wide enough to include profits earned in a trade by vicarious exertion, in the category of "income derived from personal exertion;"

(ii) that the tax if levied on the profits when in the hands of the trustees can be levied only on the basis "of income derived from personal exertion" and the same profit in the hands of the beneficiary cannot be assessed on any other basis;

(iii) that the Act need not be deemed to contemplate the assessment of the person who is the final recipient of the income.

(iv) that the liability of the trustees to be assessed to income tax is not secondary and they stand on the same footing as beneficiaries,

(v) that the mere mixing up of other incomes does not make the "income derived from personal exertion" taxable on any other basis and that therefore the beneficiary can be taxed only on the basis of "income derived from personal exertion."

P. O. Lawrence and Austen-Cartmell—for Appellant.

Poley (with him R. B. Finlay)—for Respondent.

Lord Sumner :—The question on this appeal is shortly whether a portion of the appellant's income is assessable to income tax as income derived by him from personal exertion or as income derived by him from the produce of property within Victoria, within the Income Tax Acts, 1895 and 1896, of the State of Victoria. The appellant returned this sum under the former head ; the Commissioner of Taxes assessed him under the latter, and thereby doubled the rate of tax chargeable. Mr. Syme objected, and paid under protest, and his objection was duly transmitted for hearing and determination to a judge of County Courts, who stated a case for the opinion of the Supreme Court which raised the above question. The Supreme Court decided against him on

the authority of *Webb v. Syme* (1), in which the same question, on practically the same state of facts, had been answered by the Supreme Court of the State of Victoria in Mr. Syme's favour and against him by the High Court of Australia. So far as questions of principle and of construction of the Acts are concerned, this case is therefore in effect an appeal from *Webb v. Syme* (1).

Briefly, the facts are these. Mr. David Syme was a newspaper proprietor, and printed and published the *Age*, the *Leader*, and *Every Saturday*. The business was large and lucrative. He had also separate businesses, relatively inconsiderable, in connection with the properties known as Killara and Melbourne Mansions, and a farm at Mordialloc. He called the publishing concern "the *Age* business" after the principal and well-known newspaper. In 1908 he died, leaving a widow five sons, of whom the appellant is the eldest, and two daughters. The debts and funeral expenses of the testator had been paid prior to 1910. On this one point the facts in this case differ from those in *Webb v. Syme* (1), and for what it is worth it is in the appellant's favour. In *Webb v. Syme* (1) some reliance was placed on the possibility that in the year of assessment then in question there might be debts of the testator still to be discharged. There were none in the year in question now.

David Syme left certain specific legacies, and then gave the residue of his estate, consisting principally of the above businesses, to trustees. The "*Age* business" they were to carry on, the other businesses and the rest of the residuary estate they were to convert, with power to postpone the conversion and to manage in the meantime. Out of the income of the residuary estate and out of the profits of the "*Age* business" and the other businesses while carried on, the trustees were to pay to the widow an annuity, which is the first charge thereon, to set aside certain capital sums for the benefit of the testator's daughters, and also of a charity to be called by his name, and then as to the residue, to divide the income equally among the five sons. This is being done at present, and the ulterior trusts are not now material.

It so happens that the will names the appellant as one of the trustees, but it is rightly agreed that this is for present purposes of no consequence, as he might be removed and replaced by some one else. It also happens that as one of the managers of "the *Age* business" he is paid an appropriate salary, but nothing turns on this. His salary is clearly income derived by him from personal exertion, and is so assessed, and is outside the area of matters in dispute.

Having cleared the testator's estate of debts the trustees are now carrying on the businesses. In the main they do so at a large profit. For 1910 the newspaper business yielded a profit of £ 81,759 15s. 1d. and the Melbourne Mansions business a profit of £ 3,715 16s. Losses were incurred at Killara and Mordialloc, but they only amounted together to £ 376 4s. 8d. On the whole there was £ 85,397 13s. 10d., to divide, of which the appellant's one-fifth share is £ 17,079 10s. 9d. This he returns as £ 17,025 17s. 3d. derived from personal exertions, and only £ 53 13s. 6d. from the produce of property. The Commissioner claims and the Supreme Court has held, as the High Court held in *Webb v. Syme* (1), that the £ 17,025 17s. 3d. is also derived from the produce of property.

There is no doubt that this money is made in business, and Section 2 of the Income Tax Act, 1895, as amended by Section 4 of the Income Tax Act, 1896, which Acts are to be read as one Act, defined "income derived by any person from personal exertion" as, among other things, "all income arising or accruing from any trade carried on in Victoria, although the income has not arisen or accrued or been...derived from the tax-payer's own personal exertion or trade," and "trade" is defined to include every business. Under the same sections "income derived by any person from the produce of property" is defined as meaning "all income derived in or from Victoria, and not derived from personal exertion," which again "shall include income of the tax-payer, although the same has not been derived from his own property." The charging section, which in Section 5 of 1895, classifies the tax according as the income taxed falls within one or other of the above categories.

Their Lordships are unable to hold that the portion of the appellant's income in question is not "income arising or accruing from any trade carried on in Victoria," and therefore is "income derived from the produce of property," and this for several reasons.

In saying "any trade carried on in Victoria" the definition does not say by whom such trade is carried on. The amending section enlarges "personal exertion" and extends it to trade carried on by vicarious exertion without stating the legal relationship between the real and the vicarious trader, or defining the capacity in which the business must be carried on by the latter. Their Lordships were informed that the provision in the Act of 1896 was inserted to settle a doubt whether a person could claim the lower, or personal exertion, rate, when all the work in his business was done for him by his agents. Be this as it may in fact, the enactment is general in form; it does not make the definition of 1895 affirmatively include business carried on by agents, but it provides negatively that a business may be carried on by personal exertion for the purposes of this Act, even when there is no personal exertion on the part of the person who benefits by the business, but everything is done for him. Again the Act does not say for whom the trade is carried on. When a trade is carried on by trustees there is no doubt that they carry it on for the beneficiaries and not for themselves, save in so far as their remuneration is provided for by law or by the trust deed. Unless the definition clause, as amended, is interpreted as though it ran "any trade carried on by the tax-payer or his agents," for which the language of this taxing Act affords no sufficient warrant as against the subject, the definition of "income derived from personal exertion" is wide enough to cover the present case. What the appellant gets is "income arising..... from a trade carried on in Victoria" by trustees, for the benefit of himself and others, entitled equally with him, "although the same has not accrued..... from his own personal exertion" in his capacity as such a beneficiary.

Again, it is not disputed that in certain events the trustees are assessable in respect of the appellant's one-fifth share of the earnings of the "Age

business," and the appellant contends that they are assessable in respect of the entire five-fifths in any event at the option of the Commissioner. Now there is no doubt that these Income Tax Acts do not contemplate taxing the same fund twice over. If the trustees are assessed, they must be assessed upon "income derived from personal exertion," for by the personal exertion of themselves or their agents they make the money in trade. How then can the appellant be assessed otherwise when the assessment is made directly upon him? If the same money is to be regarded as two incomes as it must be if it is to be assessable on two different bases, there would be double taxation of the same money, which no one suggests; and if there is no double taxation of the same money, then since the same money is, at any rate in some events, assessable in the alternative either on the trustees, who make it, or on the beneficiaries, who enjoy it, the assessment must in either case be made on the personal exertion basis, for that and that alone fits the case of an assessment on the trustees. For this purpose it matters not whether the cases in which either the trustees or the *cestui que trust* can be assessed in the Commissioner's option be few, as the Commissioner argues, or many, as the appellant submits. In either event the logical result is the same. Since both the trustees and the *cestui que trust* can be assessed on this money, either both must be assessed at the same rate, and that must be the personal exertion rate, for to tax the trustees at the produce of property rate on what they earn themselves would be impossible; or they must be taxed at different rates in the option of the Commissioner, although the subject-matter of taxation is one and the same fund.

There is no escape from this dilemma except the one adopted by the majority of the High Court of Australia in *Webb v. Syme* (1), and supported by the respondent on this appeal, and the crux of the case has been: is this a way out?

The argument is that the Act must be deemed to contemplate the assessment of the persons who are the final recipients of an income and can spend it as they please, since it provides (Section 9, sub-Section 2 of Act No. 1374) that, in estimating the balance of income liable to

be taxed, on the one hand rent of dwelling-houses, maintenance of families, and other personal disbursements shall not be deducted, and on the other (Section 9, sub-Section 3 of Act No. 1374) that premiums of insurance on the tax-payer's life, calls or contributions on shares held by him in companies in liquidation or re-construction and losses incurred in other trades which he may carry on may be deducted. These are all matters neither known to nor any concern of trustees. This is so; but there is nothing to limit persons who can be assessed to such persons as may wish to deduct the expenses of their families, or be in a position to deduct premiums, because they have families for whose benefit they insure their lives. Such persons are included and taxed no doubt, and may be a large proportion of the tax-payers, but others, trustees among them, are included; and when trustees are assessed Section 34(2), provides sufficient machinery to enable the *cestui que trust* to obtain the benefit of such deductions in the shape of a refund, direct, or indirect, of tax over-paid by a trustee who was ignorant of, or for any other reason did not or could not claim, the deductions which his *cestui que trust* might have made. Next it is said that Section 15 (2) and Section 41 (1) of Act No. 1374 and Section 12 (1) (c) of Act No. 1467 shew that the legislature intended to impose assessment upon a trustee only as a secondary liability, failing payment of the tax by the *cestui que trust* or failing the opportunity of assessing him in the first instance. Their Lordships are unable to accept the contention. The Acts say nothing about the primary liability of the *cestui que trust* and the secondary liability of the trustee; they do not make the trustee a surety for his *cestui que trust's* income tax at most they give him a right of recourse in case he is compelled to pay it. The Acts, in so far as they make trustees assessable, do so upon the same footing as the *cestui que trust*, and this is for the more convenient collection of the revenue, and cannot therefore by an implication increase the burthen on the tax-payer.

Lastly it is said that the income is not the same income, and the fund which produces it is not the same fund, when the trustees are assessed as when

the *cestui que trust* is assessed. They carry on several businesses, one great and the rest relatively small, some at a profit and some at a loss. They set off losses against profits, and bring down a balance on profit and loss account; they discharge sundry prior charges, and then divide an ultimate balance. All this is true, but all this is mere book-keeping. It does not follow when the appellant receives the cheque for his share that he is getting a part of a new mixed fund or that the connection between his income and the newspaper business is lost. There is no difficulty, either in fact or in theory, in keeping the "*Age* business" apart from the other businesses, and all the businesses apart from those concerns the income of which is the produce of property. The commissioner's argument conceived the fund out of which the appellant is paid as a reservoir, fed by various streams descending from sundry sources and blending their waters in one basin, out of which they flow indistinguishably and indissolubly. With all respect to the learned judges, the majority in the High Court of Australia in *Webb v. Syme* (1) who adopted this figurative way of putting a very plain set of facts, their Lordships are only able to regard this argument as fallacious. There is no question here of showing whence the sovereigns came in the first instance which were ultimately paid to the appellant. In the ordinary course of business the trustees may mix all the sums that come to their hands from all sources, and with them discharge indiscriminately all or any of the obligations which fall upon them whether at law or in equity, but they keep accounts all the time, and there is no doubt whatever that the appellant's £ 17,025 17 s. 3 d. comes from the "*Age* business," and that the profits of the Melbourne Mansions Company was made in them, and is his solely because under his father's will they are carried on for him and the other members of the family. What was the produce of personal exertion in the trustee's hand till they part with it does not, in the instance of transfer, suffer a change, and become the produce of property and not of personal exertion, as it passes to the hands of *cestui que trust*.

Their Lordships are accordingly of opinion that the appellant's contention is right that the question stated in the spe-

cial case should have been answered in his favour, and that the judgment of the Supreme Court of Victoria should be set aside, and judgment should be entered for the now appellant for the amount paid by him under protest and in excess of his contention, and they will humbly advise His Majesty that the appeal should be allowed with costs here and below, and that judgment as above stated should be entered for Mr. Syme.

T. S. N.

Appeal allowed.

Solicitors for Appellant—Keen, Rogers & Co.

Solicitor for Respondent—Freshfields.

**** A. I. R. 1914 Privy Council.**
(FROM ONTARIO.)

6th July, 1914.

VISCOUNT HALDANE L. C., EARL LOREBURN, LORD MOULTON, LORD SUMNER AND SIR GEORGE FARWELL.

Davies—Appellant

v.

James Bay Railway Company—Respondents.

(And consolidated Cross-Appeal).

On Appeal from the Court of Appeal for Ontario.

**** Land acquisition**—Land taken with a reservation of the minerals to the vendor—The Common Law of England and Ontario is, the vendor cannot in the absence of special bargain work them, so as to let down the surface sold, for the natural right of support for the surface passes to the purchaser—Under the Railway Clauses Consolidation Act of 1845, ss. 77 to 85 (England) the owner can work the mines but must submit to be compensated for their loss if the company desires so to do—In the Dominion of Canada this natural right of support is not taken away but the Company is put on terms to compensate the mineral owner at once for loss of value arising from the liability to support—Railway Act of Canada ss. 26, 151, 177, 169 to 171, 191 and 192 and 193—Mines and minerals.

The respondent Railway Company acquired a certain portion of land belonging to the appellant which contained shale of considerable value which could be got at only by surface working. Regarding the compensation to be paid for this loss of shale held

(i) that the common law of England and Ontario was that as the natural right of support of the surface passes with the land, the vendor in the absence of a special bargain cannot work the mines so as to let down the surface;

[P. 240, C. 2.]

(ii) that the Railway Clauses Consolidation Act, 1845, Sections 77 to 85 of England deprived Rail-

way companies of this natural right and the owner was free to work the minerals subject to being compensated;

[P. 240, C. 2.]

(iii) that the Railway Act of Canada did not take away this right of support but put the company on terms to compensate the mineral owner at once for the loss of value arising from the liability to support which rested on him after severance of the titles to the mineral and to the surface. This compensation having been paid the mineral owner, was by sections which have a separate and distinct purpose, restrained from working his minerals excepting under such conditions as might be imposed by the Railway Board in the interest of the safety of the public. (Sections of the Railway Act, exhaustively discussed.)

R. Finlay, A. W. Ballantyne, and Geoffrey Lawrence—for Appellant.

P. O. Lawrence, R. B. Henderson, and Tyrrell Paine—for Respondents.

Viscount Haldane, L.C.—This appeal raises a question of importance as to the interpretation of the Railway Act of Canada. The case has been twice argued before the Judicial Committee. At the conclusion of the first argument it became clear that, of several points at first raised, the real one, on which the parties had been so divided as to be unable to come to a settlement, was the point which became by agreement the exclusive subject of argument on the second hearing.

The relevant facts may be stated very briefly. The appellant claimed compensation from the respondents for the compulsory taking of part of the land owned by him in the Don Valley near Toronto. His claim related to several pieces of land, and included compensation for damage sustained by the exercise of the powers of the railway company. The claim was referred to the arbitration of three arbitrators, who awarded in satisfaction a total sum of 238,583 dollars. On appeal to the Court of Appeal of Ontario this sum was reduced to 122,171 dollars. Both parties have appealed to His Majesty in Council from this decision. The cross appeal of the respondents related to a claim in respect of a small piece of land which, as the result of arrangements come to after the first hearing, is not now in controversy. The case of the appellant on the second hearing was exclusively concerned with his rights as regards the minerals lying under the railway track over the land taken, and with certain minor matters which, including a question as to adjacent minerals, have been disposed of by the agreement of counsel. The remaining issue was, at

the close of the first hearing reduced to one of principle determining the compensation to be made. If the appellant is not to be paid for shale under the right of way (meaning the track of the railway), the award is to be for 119,831 dollars, while if he is to be so paid, the award is to be for 230,820 dollars.

The question which thus arises for decision relates to the basis of compensation, and depends on the construction of the Railway Act of Canada. Under this Act the respondents took such land of the appellant as was required for the purposes of the track. Under it is shale of considerable value. It is agreed that this shale can only be got by surface working, and in addition must be left practically entirely unworked in order that the surface occupied by the railway may be supported. Because the appellant was practically deprived of his right to mine for this shale the arbitrators agreed that he was entitled to be compensated for the injury thus inflicted on him. The Court of Appeal, on the other hand, took the view that as the respondents had not bought the minerals their value could not be taken into account in the present proceedings, but ought to be taken into account if the appellant applied hereafter to the Board of Commissioners established under the Railway Act for permission to work the shale. The reasons for this divergence of view will appear when their Lordships refer to the provisions of the Railway Act.

Before doing so it will be convenient, as the analogy of the law of England, and particularly of the Railways Clauses Consolidation Act, 1845, has been much referred to in the arguments, both in the Court below and before the Judicial Committee, to state what the law is, not only apart from, but as affected by, the English Railways Clauses Consolidation Act. It is the more desirable to do so because the Railway Act of Canada is framed on a scheme which is in many respects different from the scheme adopted in England. In Canada the conditions to which railway construction is subject are different from those which prevail here, and the differences appear to have been carefully kept in view by the Dominion Parliament when deciding on the scheme of the Railway Act,

Apart from the English Railways Clauses Consolidation Act, when land is sold with a reservation of the minerals to the vendor, he cannot, in the absence of special bargain, work them so as to let down the surface which he has sold. The reason is that there is a natural right of support for the surface which passes to the purchaser when he buys it. Although the vendor retains the minerals and the right to work them, he can exercise this right only at his own risk. It is inaccurate to say that the purchaser buys, in addition to the surface, an easement of support for that surface. He acquires the right of support. Not as a separate easement, but as a natural feature of the title to his land. The value of this necessary right, which is incident to his ownership, is thus *prima facie* included in the price which he has paid.

Such is the common law both in England and Ontario, but in England it has been completely altered in the cases to which they apply by Sections 77 to 85 of the Railways Clauses Consolidation Act, 1845. Under these sections, so far as concerns mines and minerals under the railway, or within the prescribed distance, which is normally forty yards on each side, the company is deprived of the natural right to support which it would have under an ordinary conveyance. Unless it has expressly purchased the minerals, the owner may work them in the fashion which is usual in the district, and even by open working in a way which may destroy the railway. He may let down the surface, for the natural right of support has been taken from its owner. But he must before working give the company thirty days' notice of his intention, and the company may, then or thereafter, if it is willing to pay compensation, give him a counter-notice, and so, on paying compensation, stop the working. These provisions are valuable to the company, for they enable it to defer finding capital for the purchase of the minerals under the land, until, for the sake of safety, it becomes necessary to do so. On the other hand, the mine owner is, for a time at least, free to work, though the amount that he receives as the price of the surface is diminished by the taking away from it of the incidental and natural right to support. If the owner claims on

a compulsory sale of the surface for injurious affection of his title to the minerals, the answer to him is that his title is not at present injuriously affected inasmuch as he can work freely until he receives a counter-notice, after which he may be able to claim full compensation for the minerals themselves.

In the Dominion of Canada the law has been differently moulded. Their Lordships have given much consideration to the group of clauses in the Railway Act which deal with the policy adopted, and they think that their effect is as follows: The company which acquired the surface was not, as by the English Act, deprived of the natural right to support from subjacent and adjacent minerals. It was, on the other hand, put on terms to compensate the mineral owner at once for loss of value arising from the liability to support which rested on him after severance of the titles to the minerals and to the surface. This compensation having been paid, the mineral owner was, by sections which have a separate and distinct purpose, restrained from working his minerals excepting under such conditions as might be imposed by the Railway Board in the interest of the safety of the public. These conditions, in the case of adjacent minerals, might be very easy. In such a case, just because the Board was likely to leave him comparatively free to work his mines, the initial compensation would be small. But, where the minerals lay under the railway, and especially where they could only be won by surface working destroying the railway track, the compensation awarded initially would be heavy, inasmuch as the title to the minerals and their present value for working or for sale would be materially impaired. Their Lordships recognize that considerations may have presented themselves to the Parliament of Canada quite different from those which presented themselves to the Parliament of Great Britain. In the latter country comparatively little land was available, and a different scheme from that adopted might have placed a heavy burden of finding immediate capital on the railway companies, and might also have unnecessarily interfered with the liberties of many mineral owners in the comparatively small areas dealt with. In Canada, on

the other hand, where the railways were likely to extend over great stretches of undeveloped country, it may well have been wisest to proceed on the footing that mineral rights were likely to be less frequently of immediate practical importance and would be less often asserted. It would, in this view, be natural to let the railway companies assume at once under such circumstances liability to compensate for injurious affection of title to minerals, while, on the other hand, the mineral owner, whose title had been so affected, was placed under restrictions to be imposed when he, if he ever should, desired to proceed to work. The discretion was entrusted to the Railway Board, a judicial body intended to be presided over by a judge and to have the assistance of experts.

If this be the result of the Canadian legislation it was proper to take the course which the arbitrators took in the present case, and to award compensation for injurious affection.

Their Lordships now turn to the sections on which their view of the question of principle is founded. Section 26 defines the jurisdiction of the Commission. It is to decide on complaints that any company or person has failed to do any act, matter, or thing required to be done by the Act or the special Act, or by regulations, orders, or directions made under the Act, or that any act, matter, or thing has been done in violation thereof. By Section 151 the company may purchase any land or other property necessary for the construction, operations, or maintenance of the railway. Section 177 enacts restrictions on the quantity of land so to be taken. Sections 169 to 171 relate to mines and minerals. The company is not (Section 169), without the authority of the Board, to locate the line of its proposed railway or construct the same so as to obstruct or interfere with or injuriously affect the working of or the access to any mine then open, or for the opening of which preparations are being lawfully made. The company is not (Section 170), unless the same have been expressly purchased, to be entitled to any mines or minerals under lands purchased or taken by it under the Act, except such parts as are necessary to be dug, carried away, or used in construction. No owner, lessee, or occupier (Section 171) of any

such mines or minerals lying under the railway or its works, or within forty yards from them, is to work the same unless leave has been obtained from the Board. On any application to the Board for leave to work, the applicant is to submit full plans. The Board may grant such application upon such terms and conditions for the protection and safety of the public as to the Board seems expedient, and may order that such other works be executed or measures be taken as under the circumstances appear to the Board best adapted to remove or diminish the danger arising or likely to arise from such mining operations. The provisions as to compensation are to be found in Section 191 and the following sections. Plans, profiles, and books of reference are to be deposited, and then application may be made to the persons who are the owners of, or interested in, lands (which by the definition section are defined in terms wide enough to include mines) to be taken, or which may suffer damage from the taking of materials, or the exercise of any of the powers granted for the railway, and thereupon agreements may be made touching the lands or the compensation to be paid for the same, or the damages, or as to the mode in which such compensation is to be ascertained, and there may be a reference to arbitration. The amount of compensation or damage is, by Section 192, to be ascertained as at the date of the deposit. By Section 193 the notice served is to contain a description of the lands to be taken or of the powers intended to be exercised in regard to them, and a declaration of readiness to pay a certain sum or rent as compensation for the lands or the damages.

The sections referred to are those which appear to be most important for the purposes of the present question. Their Lordships interpret them as meaning that there is to be an immediate claim for compensation for the value of lands taken and for injurious affection of any other hereditaments the title to which is affected, such as subjacent or adjacent mines and minerals. In default of agreement they think that the entire amount of compensation is to be ascertained by the arbitrators as at the date of the deposit of the plans and once for all. For the rest the mine owner remains entitled to his minerals but sub-

ject to any obligation of natural support which attaches on severance. The Board is to regulate the exercise by him of his remaining rights in the future, and the primary purpose of the intervention of the Board is to be the protection, not of the mineral owner or of the railway, but of the public. If the Board refuse him leave to work, his grievance is against the Board, to whom, and not to the railway company, his application is to be made. The principle on which the Legislature has proceeded is apparently to dispose of the claim against the company once for all on the occasion of taking the land. Their Lordships do not think it necessary to decide, whether, either in Section 26, or in Section 59, which relate to the powers of the Board to direct the construction of buildings and works on proper terms as to compensation, or in Section 171 or elsewhere in the Act, any power can be found which enables the Board to award to the owner of mines and minerals, who has applied to it for leave to work, compensation by reason of the Board having restricted his liberty in the interest of the public. It may be that the Legislature has thought it right to give no such power. The only point which it is either necessary or proper to decide now is that power to award compensation as between the railway company and the owner of subjacent or adjacent mines for injurious affection of the title to the minerals has been entrusted to the arbitrators. The principle adopted is, as has been already observed, one which in the case of a country of great extent, with its minerals widely scattered, might not improbably commend itself as more adopted to the circumstances than the principle of the English statute. At all events this is the principle which the language of the statute appears to lay down.

Their Lordships have examined the reasoning of the careful judgment of Hodgins, J., as delivered on behalf of the Court of Appeal, in which the decision of the arbitrators was reversed. There are two main grounds on which, after consideration, they find themselves unable to concur in his reasoning. They think that the arbitrators were right in holding that the mineral owner suffered immediate damage as the consequence of the duty of support which on severance the law imposed on him, and that so far as

the shale under the railway track was concerned, he substantially lost the value of his shale, the more plainly because it could only be worked from the surface. It is no answer that the owner probably did not desire to get at his minerals at once. His title to them was practically, so far as it was possible to foresee, destroyed, and he suffered immediate loss accordingly. They are further, for the reasons already given, of opinion that even if they were satisfied of the correctness of the view of the learned Judge on the other point, they ought not to treat it as arising at present. That view was that the Board has the power, upon the application of the mineral owner, to order the railway company to

"acquire such part of the minerals as in England would be covered by the counter-notice of the Railway Company; or to put it in another form, to so support and maintain their line, and to acquire the necessary land and minerals for that purpose."

They are not, as at present advised, prepared to express the opinion that the Canadian Act has substituted for the English system of notice, counter-notice, and compensation the interposition of the Board, and that the latter has jurisdiction to protect the mine owner and the Railway company by its order. It appears to their Lordships that it may well be that the powers of the Board to impose conditions on the action of the mineral owner are conferred for a wholly different purpose, and do not extend to the making of any such order. But they hold that the question does not arise for immediate decision if it is once established that injurious affection has occurred to the extent of depriving the mineral owner of the present value of his subjacent minerals by the imposition of the duty of support and the taking away of the right of surface working. They think that the arbitrators in substance dealt with the question of compensation on a proper principle. As to adjacent minerals no controversy arises.

In the result their Lordships think that the appellant was entitled to be awarded compensation for loss of title, a loss substantially equivalent under the circumstances to the value of the shale. They hold that the arbitrators were bound to take this loss into account in assessing the compensation to be paid, and that the respondents must, therefore, pay to the

appellant the agreed sum of 230,820 dollars, and they will humbly advise His Majesty accordingly.

As the appeal has resulted in a settlement of other questions in dispute and as the victory in the litigation is a divided one, they think that the proper mode of dealing with the costs will be analogous to that adopted in the Court of Appeal, and that there should be no costs either of the first hearing of this appeal or of the cross-appeal, or of the hearing in the Court below. The respondents ought, however, to pay to the appellant the further costs limited to those occasioned by the attendance of counsel and solicitors at the second hearing before this Board.

T. S. N.

Appeal allowed.
Solicitors for Appellant—Blake and Redden.

Solicitors for Respondents—Linklater, Addison and Brown.

**** A. I. R. 1914 Privy Council.**
(FROM CEYLON.)

14th December, 1914.

LORDS MACNAGHTEN, MERSEY AND ROBSON.

Charles Edward Victor Seneviratne Corea
—Plaintiff

v.
Mahatantrigey Iseris Appuhamy and another—Defendants.

On Appeal from The Supreme Court of Ceylon.

(a) *Trusts Act, S. 94—Property of deceased left derelict, taken possession of by Court Officials—Possession is presumably for benefit of rightful claimants—Succession.*

Where property of a deceased person is left derelict and is taken possession of by officials of the Court, it must be presumed that such possession was taken for the benefit of the persons rightfully entitled. [P. 244, C. 2.]

Where subsequently the Court Officials gave possession of the estate to the deceased's brother knowing who he was and his relationship with the deceased, and afterwards there was an action for partition against that brother by his co-heirs.

Held, that it was immaterial whether there was an order of the Court on the subject or whether the officials simply retired in favour of the brother. [P. 244, C. 2.]

(b) *Limitation—Law in Ceylon.*

The whole law of limitation in Ceylon is now contained in the Ordinance of 1871.

[P. 245, C. 1.]

**** (c) Adverse possession—Ceylon Prescription Ordinance, 1871, S. 3. Uninterrupted possession is not material unless adverse or is by independent title—Possession of co-heir is not such possession as against other co-heirs**

—*Pretending to have no title or claiming as sole heir will not alter nature of possession—Ouster is necessary to constitute adverse possession by co heir—Ouster was not presumed in this case from long continued possession—Co-sharers.*

By Section 3 of the Prescription Ordinance of 1871, undisturbed and uninterrupted possession by a defendant, of immovable property by a title adverse to or independent of that of the plaintiff for 10 years entitled the defendant to a decree in his favour. Undisturbed and uninterrupted possession was explained as possession unaccompanied by payment of rent or produce, or performance of service or duty or by any other act by the possessor from which an acknowledgment of a right existing in another person would fairly and naturally be inferred. [P. 245, C. 1.]

One of several co-heirs of a deceased person got possession of the estate. It was not proved that he took out administration to the estate or that he acknowledged the title of his co-proprietors within the material time.

Held:—These points were not material to the real question at issue. Coupled with undisturbed or uninterrupted possession defendant must prove adverse or independent title. [P. 245, C. 2.]

The defendant's title being common to him and to his co-heirs (from whom plaintiff derived his right) was not independent. On the death of the propositus his heirs had unity of title as well as unity of possession. [P. 245, C. 2.]

As to the possession being adverse, the defendant entering into possession and having a lawful title to enter could not divest himself of that title by pretending that he had no title at all. His title must have enured for the benefit of his co-proprietors. Possession is never considered adverse if it can be referred to a lawful title. *Thomas v. Thomas* referred. [P. 245, C. 2.]

A conclusion that the defendant entered as "sole heir" is not possible in law. His possession was in law the possession of his co-owners. It was not possible to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result. [P. 246, C. 1.]

This was not a case in which the circumstances could justify the presumption of ouster from long continued, undisturbed and uninterrupted possession, in favour of such a man as the defendant who had always pretended to be a "sole heir." [P. 246, C. 2.]

P. O. Lawrence Dornhorst, and Barrington-Ward—for Appellant.

Atherley-Jones, and Horace Miller—for the first Respondent.

Lord Macnaghten:—This seems to be a very plain case.

The action out of which the appeal has arisen was an action for partition of certain lands, part of the estate of one Elias Appuhamy of Galmuruwa, in the district of Chilaw.

Elias died in July, 1878. He was never married and he died intestate. His heirs were his brother Iseris and three sisters.

Taking by descent the heirs took as tenants in common in accordance with the provisions of Section 18 of the Partition Ordinance of 1863.

Elias came originally from Baddegama, in Galle district, about 120 miles from Chilaw. His father and mother and the rest of his family lived there apparently in somewhat humble circumstances. Elias prospered in Chilaw. After a time he was joined by his brother Iseris, who says that he left home alone when he was ten years old, though he was probably three or four years older at the time. The two brothers kept a shop or store in Chilaw, in which they seem to have been jointly interested. But it is admitted that the lands in question in this action were the separate property of Elias.

At the time when Elias died, Iseris was in gaol under sentence of imprisonment for assault and robbery.

The property being thus left derelict, possession was taken by officials of the District Court. It must be presumed that such possession was taken for the benefit of the persons rightfully entitled.

Iseris came out of gaol in December, 1878. Thereupon, or soon afterwards, he entered into possession of the intestate's lands. The circumstances under which the officials of the Court relinquished possession in his favour do not appear in evidence. It seems, however, to be immaterial whether there was an order of the Court on the subject or whether the officials who must have known who Iseris was, and must have been aware of his relationship to the intestate, retired in his favour without any specific directions. The Trial Judge says that they were "ejected" by Iseris, but no statement or suggestion to that effect is to be found in the evidence.

Some time after the death of Elias two of his sisters made their way to Chilaw. They seem to have been kindly treated by Iseris, who gave them small sums of money from time to time and allowed them to obtain provisions from his shop without payment. Indeed, one of the sisters named Balohamy lived for a long time in a house on Medawatta, which was one of the plots or parcels of land belonging to Elias and part of his estate.

In 1907 Iseris by deed settled the intestate's land on his son, reserving a life

estate. This action on the part of Iseris was the talk of the neighbourhood. Balohamy, who was then the only survivor of the three sisters, became alarmed. Lawyers were consulted. Under their advice Balohamy brought an action for partition against Iseris. The action was confined to Medawatta, on the score, it was said, of expense, in order to save the stamp or fee which would have been payable if the whole estate had been the subject of the action. Then Iseris turned her out of her home. Being without means, Balohamy and other co-proprietors in the same interest sold their rights or claims to the plaintiff Corea, who was Balohamy's legal adviser and advocate. He brought this action against Iseris. Iseris' son was afterwards made a party to the action.

Iseris in his defence claimed the benefit of Ordinance No. 22 of 1871 entitled "An Ordinance to amend the laws regulating the prescription of actions."

It is not disputed that by that Ordinance, or by an earlier Ordinance of 1834 which was repealed by the Ordinance of 1871, the old law was swept away. The whole law of limitation is now contained in the Ordinance of 1871.

Section 3 enacts that

"proof of the undisturbed and uninterrupted possession by a defendant in any actionof lands or immovable property by a title adverse to or independent of that of the claimant or plaintiff in such action...for ten years previous to the bringing of such action shall entitle the defendant to a decree in his favour with costs."

The section explains what is meant by undisturbed and uninterrupted possession. It is

"possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor from which an acknowledgment of a right existing in another person would fairly and naturally be inferred."

Then follows an analogous provision in favour of a plaintiff claiming to be quieted in possession of lands or other immovable property under similar circumstances.

In the present action the plaintiff Corea offered some evidence tending to prove that Iseris took out administration to Elias. There certainly was a testamentary case in the District Court relating to the intestate's estate. But the record of the case is missing, and it is not clear whether the case was concerned with an

application by Officials of the Court or with an application by Iseris for administration. The District Judge held that it was not proved that Iseris took out administration to his brother's estate.

The plaintiff also endeavoured to prove that Iseris had acknowledged the title of his co-proprietors within ten years of the commencement of the action. On this point, also, the District Judge was against the plaintiff.

Their Lordships accept the decision of the District Judge on these two points. In their Lordships' opinion they are not material to the real question at issue. Assuming that the possession of Iseris has been undisturbed and uninterrupted since the date of his entry, the question remains, Has he given proof as he was bound to do, of adverse or independent title? His title certainly was not independent. The title was common to Iseris and to his three sisters. On the death of Elias, his heirs had unity of title as well as unity of possession. Then comes the question, was the possession of Iseris adverse? The District Judge held that Iseris "entered in the character of sole heir or plunderer." "Whichever it was," says the learned judge, "so he continued, and acknowledged no title in any one else. He has acquired a good prescriptive title." It is difficult to understand why it should be suggested that Iseris may have entered as "plunderer." He was not without his faults. He is described by the learned judge, who decided in his favour, as "a convicted forger and thief," and "expert not only in crime and incarceration but also in perjury." But it is perhaps going too far to hold that he was so fond of crooked ways and so bent on doing wrong that he may have scorned to take advantage of a good legal title and may have preferred to masquerade as a robber or a bandit and to drive away the officers of the Court in that character. It is not a likely story. But would such conduct, were it conceivable, have profited him? Entering into possession, and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title at all. His title must have enured for the benefit of his co-proprietors. The principle recognized by Wood, V. C. in *Thomas v. Thomas* (1) holds good: "Possession is

(1) 2 K. & J. 79.

never considered adverse if it can be referred to a lawful title."

The two learned judges in the Court of Appeal did not adopt in its entirety the suggestion of the trial judge. They both held that Iseris entered as "sole heir", and that his title has been adverse ever since he entered. They held that he entered as "sole heir," apparently because he had it in his mind from the first to cheat his sisters. But is such a conclusion possible in law? His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result. There is no provision in the Ordinance of 1871 analogous to the enactment contained in Section 12 of the Statute of Limitations, 3 and 4 Will. 4, c. 27, which makes the title of persons "entitled as co-parceners, joint tenants or tenants in common" separate from the date of entry. Before that Act was passed it was a settled rule of law that the possession of any one of such persons was the possession of the other or others of the co-proprietors. It was not disputed at the Bar that such is now the law in Ceylon.

The learned Counsel for the respondent, who argued the case with perfect candour, and said all that could be said on behalf of the client, did not, of course, question the principle on which Wood, V.C. relied in *Thomas v. Thomas* (1). His submission was that the Court might presume from Iseris' long continued possession undisturbed and uninterrupted as it was that there had been an ouster or something equivalent to ouster. No doubt in former times before the statute of William IV., when the justice of the case seemed to require it, juries were sometimes directed that they might presume an ouster. But in the present case the learned judge did not make any presumption of that sort. Nor, indeed, did Iseris before this action was brought attempt to rely on adverse possession. His pretence was that he was sole heir. In the first partition action he swore that he did not know the name of his father or that of his mother. He swore that Balohamy was only a cousin; he knew nothing he said about his family except that he was the only brother of Elias. For this audacious

statement he was indicted for perjury at the instance of the Judge. He was convicted and sentenced to fine and imprisonment. The Judge who pronounced sentence observed,

"It is clear that he was determined to prove that he was the sole heir and strenuously to deny anything that might count against him."

Be that as it may, this is not a case in which the circumstances could justify the presumption of ouster in favour of such a man as Iseris.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, the judgment of the Supreme Court and the judgment of the District Judge set aside, with costs in both Courts, and a decree made for partition of the lands which on the death of Elias passed by descent to his heirs. The respondents will pay the costs of the appeal.

S. A. R.

Appeal allowed.

Solicitors for Appellant—Blyth, Dutton, Hartly and Blyth.

Solicitors for Respondent—Surridge and Mullis.

A. I. R. 1914 Privy Council.

(FROM ONTARIO.)

2nd April, 1914.

THE LORD CHANCELLOR, LORDS
DUNEDIN, SHAW, MOULTON AND PARKER
OF WADDINGTON.

Arthur Allen and others—Appellants

v.

John C. Hyatt and others—Respondents.

Privy Council Appeal No. 39 of 1913.

Company—Directors—Duty of the directors is primarily to the company, but in special circumstances they may be held to be acting for individual share-holders—Action brought by certain share-holders as a class action, for declaration that the directors were trustees to the share-holders for profits made by them in certain transactions with another company—Actions cannot be maintained without setting aside the transactions—Both the companies are necessary parties—But where throughout (in an Ontario case) the action was treated as one by individual co-plaintiffs, and no prejudice had been caused, the non-impleadment of the two companies was overlooked—Practice.

The appellants were the directors of a company called the Lakeside Canning Company. In November, 1910, negotiations took place between the appellants as directors and one Grant, who was endeavouring to amalgamate the Canning Companies of Ontario, and whose purpose was to acquire the shares and undertaking of the Lake-

side Company. The consent of the majority of the share-holders being necessary for this amalgamation, the appellants approached individual share-holders including the respondents and induced them to give the appellants options to purchase their shares at par value with interest at 7 per cent. for the period during which no dividend was paid. The options were exercised and by the sale of these shares to Grant, the appellants made handsome profit. The respondents sued for a declaration that the appellants were the trustees for the share-holders of the Lakeside Company of the profits derived by the sale, and for an account and consequent relief. It was contended that the appellants owed no duty to the share-holders but only to the company.

Held, that no doubt the duty of the directors is primarily one to the company itself. But it having been found that the representations made, were to the effect, that they, as directors wanted the option in order to deal with Grant on behalf of the share-holders, and that all the share-holders including themselves were to share *pro rata* in the amount realised, the directors must be taken to have held themselves out to the individual share-holders as acting for them on the same footing as they were acting for the company itself that is as agents. *Percival v. Wright* (1902 2 Ch. 421) distinguished.

The action was originally brought as a class action by the plaintiffs on behalf of themselves and all other share-holders.

Held, that the Lakeside Company was a necessary party and as the shares had been transferred to the Dominion company the action could not be maintained without asking for the transfers being set aside and that therefore that company was also a necessary party. But throughout the proceedings in the three Courts below the action was treated by these Courts, which had power to amend the pleadings if they thought it necessary, as one in which the respondents had sued individually as co-plaintiffs, joining in asserting their causes of action. The rule of procedure in Ontario does not preclude the Court from amending or treating as amended, the pleadings, so as to enable relief to be given as though claimed in this fashion. No substantial injustice having resulted from this procedure, such procedure was admissible.

The Lord Chancellor :—The appellants were the directors of a company called the Lakeside Canning Company, Limited. The capital of the company was \$750,000 in shares, each of \$250. Such shares were issued to the extent of \$30,500, and in the year 1909 and for a short time in 1910 these shares were held to the extent of \$10,000 by the seven appellants, and to the extent of \$20,500 by the twenty-two respondents and certain other persons not parties to these proceedings. In January, 1907 a dividend of 15 per cent. had been paid, but no further dividend had since been declared.

In November, 1909 negotiations took place between the appellants as directors

and one Grant, who was endeavouring to amalgamate the Canning Companies of Ontario. His purpose was to acquire the shares and undertaking of the Lakeside Company. After negotiation, during which the consideration asked by the appellants was increased, a transfer was finally agreed on, at the following price :—

	Dollars
Cash for factory and plant ...	33,750·00
Cash for raw materials ...	8,406·44
Allotment of Preferred Stock in Dominion Cannery, Limited	11,250·00
Allotment of Common Stock in ditto	15,000·00
Total in cash ...	42,156·44
Total in shares ...	26,250·00

The Dominion Cannery, Limited, was the amalgamating company which Grant was forming. The transaction was carried through early in March, 1910.

In the interval the appellant directors took various steps which have given rise to this litigation. On the representation that it was necessary for the directors to secure the consent of the majority of the shareholders in order to effect the amalgamation, and before the price had been settled they approached individual share-holders, including the respondents, and induced them to give to the appellants options to purchase their shares at the par value of \$250 with interest at 7 per cent. for the periods during which no dividend had been paid. About 18th February, 1910 they exercised these options and paid the share-holders concerned \$22,883·75. The share-holders endorsed their share certificates in blank and handed them to the appellants. The result of the transaction was that the appellants made what was apparently a handsome profit, measured by the difference between what they paid the other shareholders, and what they received from the Dominion Company, subject only to deduction of the debts of the Lakeside Company which they had undertaken to the former company to pay, but which do not appear to have been large.

The action was brought by the respondents for a declaration that the appellants were trustees for the share-holders of the Lakeside Canning Company of the pro-

fits derived from the Dominion Company, and for an account and consequential relief. Mr. Justice Sutherland tried the case and, after hearing evidence, found the facts substantially as follows:—that general and similar representations were made by the appellants to each of the respondents, to the effect that the former as directors wanted the options from the shareholders in order to deal on behalf of all the shareholders with the representatives of the Dominion Company; that the appellants expected to realise the par value of the shares and the 7 per cent. interest and that all the shareholders including themselves were to share *pro rata* in the amount realised; that the appellants did not inform the other shareholders that they were buying their shares on their own account, and that they had entered into a secret arrangement by which they kept concealed from the other shareholders, the information which it was their duty, as directors to disclose, and that the appellants were thereby guilty of fraud. Objections were taken on behalf of the appellants at the trial to the form of the proceedings. It was said that the directors were trustees, if at all, for the Lakeside Company, and that the latter ought to have been a party either as plaintiff or defendant, and that in its absence the respondents were not entitled to sue on behalf of themselves, and the other shareholders. There appears to have been some doubt as to whether the company had or had not been added as a party and the learned Judge inclined to think that, possibly because the Dominion Company had by the time of the litigation acquired all the shares, it was not represented so as to enable him to deal effectively with the matters in question. He, however, seems to have considered that as it had been made out to his satisfaction, that the appellants were, on the footing that the transaction could not then be set aside but must be treated as adopted by the respondents and other shareholders, trustees of what they had received, the objection was not serious. He offered, if the respondents preferred it, to retain the record, and after any further trial that was necessary to put it into proper form, but expressed his willingness to give judgment as it then stood to the effect already indicated. The respondents elected to accept the second alternative. The appellants

appealed to the Divisional Court, which affirmed the judgment. But as the learned Judges who heard the appeal considered that the action was really one in which a group of individual share-holders had joined together, but were suing individually on separate causes of action, they amended his judgment by confining it to the plaintiffs on the record, and directing that the account taken should deal with the amount which each individual plaintiff was entitled to receive. From the judgment in this form the appellants appealed to the Court of Appeal for Ontario. This Court took the same view as the Divisional Court, and dismissed the appeal. They concurred in the findings of fact by the Trial Judge just as the Divisional Court had done. They held that although under other circumstances it might be that the fiduciary duty of the directors was a duty to the company and not to individual share-holders, yet under circumstances such as those of the case before them, the directors became the agents in the transaction of the shareholders, when they took the options from them. They thought that the addition of the Lakeside Company as a party, if made, had been irregularly made, having regard to the real character of the action as one brought by a group of individual plaintiffs with what were substantially similar causes of action, and they struck out the name of the company from the record in affirming the judgment.

Arguments have been addressed to their Lordships both on the question of procedure and on the substantial issue whether the appellants were properly found to have put themselves in the circumstances of this case in a fiduciary relation to the respondents. On the latter point their Lordships do not think it necessary to say more, so far as the questions of fact are concerned, than that, having heard the arguments and considered the evidence, they see no ground for not accepting the concurrent findings of the three Courts which have already decided this issue. They agree with the learned Judges of the Court of Appeal of Ontario in thinking that under the circumstances of the case the respondents were entitled to treat the appellants as trustees for them, and, subject to the question of procedure, to ask for the relief they obtained,

The appellants appear to have been under the impression that the directors of a company are entitled under all circumstances to act as though they owed no duty to individual share-holders. No doubt the duty of the directors is primarily one to the company itself. It may be that in circumstances such as those of *Percival v. Wright* (1902, 2 Ch. 421), which was relied on in the argument, they can deal at arm's length with a share-holder. But the facts as found in the present case are widely different from those in *Percival v. Wright*, and their Lordships think that the directors must here be taken to have held themselves out to the individual share-holders as acting for them on the same footing as they were acting for the company itself, that is as agents.

The question of procedure has, however, been strenuously argued, and their Lordships will deal with the points raised under this head. There is no doubt that on the Statement of Claim the action was originally brought as a class action by the plaintiffs on behalf of themselves and all the other share-holders. In the absence of the company itself, which does not appear to have been properly made a party, the claim was demurrable. Moreover it appears on the face of the Statement of Claim that the shares of the plaintiffs had been transferred to the Dominion Company, so that, in the absence of a claim to set this transfer aside, a claim which could not have been successfully made in the absence of that company, the relief sought was demurrable on this ground also. The appellants therefore argued that as the proper plaintiff was the company and as the respondents had parted with their shares, the action must fail. It appears, however, that throughout the proceedings in the three Courts below the action was treated by these Courts, which had power to amend the pleadings if they thought it necessary, as one for a declaration that the appellants became, under the circumstances proved by the evidence, the agents of the respondents in dealing as they did with their shares, and that on this footing judgment was given in a form which afforded the relief to which the respondents were held entitled. In other words the action was treated as one in which the respondents had sued individually as co-plaintiffs, joining in assert-

ing their causes of action. Their Lordships see no reason for holding that any substantial injustice has been done by the Courts below in proceeding on this footing. The rule of procedure in Ontario does not, in their Lordships' opinion, preclude the Court from amending or treating as amended the pleadings so as to enable relief to be given as though claimed in this fashion. It has been argued for the appellants that because of the original form of the pleadings and the joinder in one proceeding of separate causes of action injustice may have happened by the improper admission of evidence. Their Lordships are, however, unable to find that such a result was brought about, and they think that under the circumstances the procedure adopted in the Courts below was admissible.

They will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

T. S. N.

Appeal dismissed.

A. I. R. 1914 Privy Council.

(FROM QUEBEC).

4th August, 1914.

LORDS MOULTON, SUMNER, SIR CHARLES FITZPATRICK AND SIR JOSHUA WILLIAMS.

Charles J. Wills and others—Appellants

v.

The Central Railway Company of Canada—Respondent.

Privy Council Appeal No. 27 of 1914.

(a) [*Specific Relief Act, S. 54*]*—Damages being adequate relief—Injunction was not granted—Specific Performance.*

A contract between the parties for the execution of certain works by a contractor provided that the cost of the work plus the contractor's commission of 10 per cent. was to be paid every month and that the contractor had uncontrollable discretion to refuse to proceed with the work, if not satisfied of the financial arrangements for payment. In exercise of this power the contractor gave notice of cessation of work and on the other party arranging to finish the work by employing another contractor, brought the suit for an injunction restraining the other party from completing the work itself or by employment of another contractor.

Held, that the contract being one the breach of which could be fully and completely measured by damages, the Court would refuse to decree specific performance or grant any injunction against employment of any other person to complete it.

[P. 253, C. 1.]

* (b) [*Specific Relief Act, S. 54*—*Party wrongfully refusing to carry out contract—No injunction should be granted in his favour—Grant of injunction is discretionary.*

The granting of an injunction is always a matter of discretion to some degree and no Court would grant an injunction to enforce specific performance of a contract or to prevent the other contracting party securing its performance by other means, when the party seeking its aid had wrongfully refused to carry out his part of the contract and was still persisting in so doing.

[P. 253, C. 1.]

(c) *Practice—Damages claimed in plaint—Inability to prove same—Party not to be given liberty to bring fresh action—Civil P. C., O. 23, R. 1.*

It cannot be a matter of right that a plaintiff having put in issue damages already accrued and having attempted to prove them and failed should be at liberty to bring a fresh action in respect of them.

[P. 252, C. 1.]

Lord Moulton:—The appellants in this case are the plaintiffs in the action and are a firm of contractors carrying on business in Westminster and having an office (among other places) in Montreal, in the Dominion of Canada. The respondent is a railway company whose head office and principal place of business is in Montreal. It was incorporated for the purpose of constructing and operating a railway between the town of Midland, on the Georgian Bay, and a point in the vicinity of the city of Montreal. The railway so to be constructed (including certain branch lines) was of a total length of 381 miles.

By a contract dated 6th October, 1910, the appellants, for the considerations and upon the conditions therein stated, agreed to construct the railway for the respondent. The general nature of the contract may be briefly stated as follows:—The appellants were to purchase the right of way and all necessary material and execute all the works. The respondent, on the other hand, undertook to use all their statutory powers to enable them so to do. The accounts were to be rendered to the respondent by the appellants by the eighth day of each month for all work done, supplies furnished or expenditure made during the preceding month, and, upon verification, the respondent undertook to pay the amount of such outlay with 10 per cent. commission within seven days.

It was known to the appellants at the time of entering into the contract that the finances of the respondent company entirely depended on the flotation of its

bonds, and that it was by no means certain that it would obtain thereby the money requisite to construct the railway. Accordingly, on the said 6th of October, 1910, a contemporaneous agreement was entered into to the effect that the contractors should not be bound to commence work under the contract until the respondent should have satisfied them that arrangements had been made to finance the undertaking and to provide funds to meet the payments which would from time to time become due to the appellants thereunder.

Between the date of the said contract and July, 1911, no effective steps had been taken by the respondent to obtain the necessary funds for the creation of the railway. On 25th July, 1911, however, arrangements were made for an issue of 1,000,000%. First Mortgage 5 per cent. Bonds, of which the Appellants agreed to underwrite 30,000%. In the agreement between the appellants and the respondent relating thereto there was inserted the following stipulation in favour of the appellants.

"It is agreed between us that if you should commence the execution of the works under your contract you shall be at liberty at any time in your uncontrolled and uncontrollable discretion to refuse to proceed further with the works if you are not absolutely satisfied that there are funds available for the payment of your monthly contract payments, including your 10 per cent. commission."

At the hearing of the appeal there was much discussion as to whether the true meaning of this clause was that it gave to the contractors the right to suspend work under the contract if and so long as in their opinion adequate funds were not in the hands of the company, and to resume it again as soon as they were satisfied that the funds were in hand, or whether it only gave to the contractors the right to throw up the contract at any time if they were not satisfied as to the provision of adequate funds, thus terminating the contract altogether. In their Lordships' opinion the latter, which is the interpretation contended for by the respondent, is the correct interpretation.

The issue of the bonds was only partially successful, but work was commenced under the contract, and by October, 1912, accounts had been delivered by the appellants in respect of work done, money expended, and commission to the amount

of 257,000 dollars, and had been duly paid. Some further accounts were subsequently delivered at various times down to January, 1913, and were also paid. The appellants' accounts for February, 1913, amounting to 3,825 dollars 30 cts. were rejected by the respondent, and the amount of these accounts forms part of the sum claimed herein, and judgment in respect of it (subject to a deduction in respect of a cross-account) was given in favour of the appellants at the hearing, and forms no part of the present appeal.

In the month of October, 1912, the difficulties of the respondent company became acute. Mutual recriminations took place. The railway company reproached the contractors with delay in going on with the track-laying and the ballasting, and in not procuring the track-laying equipment, and the contractors reproached the company for not having provided the funds necessary for carrying on the works. Finally, on 21st October, 1912, the contractors wrote to the company a letter, the material portion of which is as follows:—

"It is with great reluctance that we are compelled now to give you notice that unless further moneys are paid to the trustees for the bondholders, we shall have to cease operations on the construction of your railway. You will therefore please note that, unless in the meantime satisfactory arrangements in this respect are made, we will cease work on the 1st of November next.

"On being advised that the trustees have received further and sufficient cash to ensure the payment of our charges and commitments, and to warrant the continuation or resumption of the work, we shall be pleased to carry on the construction, as we are at all times fully prepared and anxious to complete the contract undertaken by us, which still remains in full force and effect."

To which the company replied on 24th October, 1912:—

"Under the circumstances, if you cease work on the 1st of November next, as stated in your letter, the company will consider your contract cancelled, and arrange to go on with the work itself as it may see fit, holding you responsible for any loss or damage which it may suffer through the non-fulfilment of your contract. Although you repeat that you have been at all times fully prepared to complete the contract undertaken by you, we cannot admit that this is correct, but, on the contrary, we claim that you have at no time taken the necessary steps to accomplish the work according to the terms of the contract."

"You say it is useless to discuss these terms, and therefore I will not do it."

Contemporaneously with this correspondence each party by a notarial pro-

test attempted to strengthen its case against the other. The protest by the contractors is dated 26th October, 1912, and it notified (after reciting the various proceedings and events on which they based their case) that if sufficient moneys were not deposited forthwith in London with certain trustees the contractors would not proceed further with the works after the 1st day of November next 1912, and would take such further action in the premises as by Counsel they might be advised. The protest on behalf of the railway company did not confine itself to making protest against the breaches of contract alleged to have been committed by the contractors, but it went on to give them notice (under a power reserved to that effect under the contract) that, unless within one month from that date the work covered by the said contract was proceeded with in such a manner as to ensure its completion at the time agreed upon and in such a manner as to satisfy the company's chief engineer, the said work would be taken out of the contractor's hands.

Their Lordships are of opinion that this threat to take the works out of the contractors' hands was not in accordance with the terms of the contract. Clause 12 of the contract under which it purports to be given makes the right of the railway company to turn the contractor out depend on the opinion of the engineer, who is made the sole judge as to whether the contractors have so failed in their duty as to bring the clause into force. In the present case the threat was given by the railway company without reference to the engineer. He was not consulted about it, and his own evidence shows that he had never even in his own mind come to the conclusion that the contractors were guilty of any such default as would warrant the clause being put into force. This notice or threat on behalf of the railway company was therefore a mere *brutum fulmen*, and would not have justified any proceedings taken in accordance with it.

Correspondence continued between the parties during the succeeding six months ending with a letter from the solicitors of the railway company to the appellants, dated the 10th March, 1913, notifying that the work had been taken out of their hands in conformity with the notice given

on 22nd October, 1912, by the protest above referred to and that the company "will take such steps as may be deemed proper and necessary to continue and complete the works of construction covered by the said contract under the superintendence of the company's engineer or by letting the work to another contractor as the company may see fit."

This was followed by the appellants bringing the present action on the 19th March, 1913.

The relief prayed by the appellants in their declaration so far as is relevant to the present appeal is two-fold. In the first place they claim a sum of \$18,825.30 which is made up of the sum of \$3,825.30 already referred to, and which has now been disposed of, and a sum of \$15,000 claimed by them as damages for breaches of contract committed by the respondent prior to the bringing of the action. They were required to give particulars of these damages and they duly delivered them and evidence was to some extent called by them at the trial to support the particulars, but that evidence was wholly insufficient.

According to English procedure this part of the claim would have been dismissed and no further action could have been brought in respect of damages thus sued for and not supported by evidence at the trial. But the learned Judge by his judgment reserved to the plaintiffs the right to recover in a future action any damages which they had suffered or might in future suffer from breaches of contract by the defendant, including those sued for in the present action. On Appeal to the Court of King's Bench for the Province of Quebec (Appeal Side) this part of the judgment was reversed. The opinion of their Lordships is entirely in favour of the propriety of this decision of the Appeal Court. But even if that were not the case it is clearly a matter of procedure dependent at best upon the discretion of the Court. It cannot be a matter of right that a plaintiff having put in issue damages already accrued and having attempted to prove them and failed should be at liberty to bring a fresh action in respect of them, and accordingly their Lordships would be very unwilling to interfere on such a point with the decision of the Court of Appeal.

This, however, is a very minor and subsidiary point. The real substance of the Appeal relates to the judgment of the Judge at the trial with regard to the following claim in the plaintiffs' declaration:—

"That by judgment to be rendered herein, the company defendant be enjoined and prohibited from itself completing the work of construction under the superintendence of the company's engineer, or otherwise or from letting the work to any other contractor or contractors, and that it be declared that the plaintiffs alone are entitled, by reason of the premises, to complete the said work according to their agreements."

The judgment of the trial Judge in respect of this reads as follows:—

"The Court doth enjoin and prohibit the defendant from itself undertaking or completing the work of construction under the superintendence of the company defendant's engineer, or otherwise, or from letting the work to any other contractor or contractors; and doth grant acts to the plaintiffs of their willingness and intention to enter upon and complete their work under said contract with all diligence, according to the terms thereof, so soon as the defendant shall have performed its obligations to make such financial arrangements as shall satisfy the plaintiffs with regard to the payment of their expenses and commitments, including their commission, and doth condemn the defendant to pay the plaintiffs' costs."

On Appeal to the Court of King's Bench (Appeal Side) this part of the judgment was set aside. The main question in this Appeal is whether that Court was right in so deciding.

The contract between the parties is for the execution of certain works, the cost of which is to be borne by the respondent, the appellants being entitled to charge ten per cent. on that cost as their remuneration for their services in actually carrying out the work. There can be no doubt that (at all events so soon as the money they have expended is repaid to them with the addition of their remuneration in respect of the same) all the work, materials, etc., become the property of the company. No doubt there remains to the appellants the right to complete the work and to earn the remuneration to which they would be entitled therefor under the terms of the contract; but that is all. Their interest is therefore pecuniary only. They have no interest in the thing produced.

Their Lordships are of opinion that this is a typical case of a contract the breach of which can be fully and com-

pletely measured by damages. In such a case the Courts in England would certainly refuse to decree specific performance or to compel the company to continue to employ the contractors in the completion of the railway by granting an injunction against their employing any other person to complete it. By bringing in another contractor the company would no doubt be treating the contract as at an end, and if this constituted a wrongful repudiation on their part the contractors would be entitled to sue them for the whole of the profits to which they would have become entitled by the completion of work. This would be full compensation for the breach, for it would give to the contractors the full return that the execution of the entire work would have brought them.

But there is here a further reason why no such injunction could be granted. The appellants neither alleged nor proved that they were willing to proceed with the contract. On the contrary, they insisted and still insist that they have a right, at their own uncontrolled and uncontrollable discretion, to suspend the works during such time as they are not absolutely satisfied that there are funds available for the payment of their monthly contract payments, including their 10 per cent. commission. This is not a mere expression of their opinion on a legal point. They have acted upon it and, indeed, at the date of the bringing of the action, they had definitely and formally acted on it for several months, and they have continued to do so ever since. Their Lordships have already decided that they had no such right as they thus claimed, so that their refusal to proceed with the contract works was wrongful. Now, the granting of an injunction is always a matter of discretion to some degree, and no Court would grant an injunction to enforce specific performance of a contract or to prevent the other contracting party securing its performance by other means, when the party seeking its aid had wrongfully refused to carry out his part of the contract, and was still persisting in so doing.

Such, then, is the position of the case looked at from the point of view of English law. Is the law of Quebec different in this respect?

So far as regards the second of the above grounds there can be no doubt that the law is the same in Quebec as it is in England, for it goes to the root of the plaintiff's right to ask a Court to protect him in the enjoyment of his contract. It is well nigh impossible to believe that the law or the procedure of any civilised country would provide that one contracting party could call in aid the powers of a Court to compel the other contracting party to observe a contract which he himself without lawful excuse was persistently refusing to perform. At all events no authority has been cited, and no grounds suggested in support of the view that either Quebec Law or Procedure would under such circumstances assist the plaintiffs in the way which they seek by their claim.

But their Lordships are also of opinion that there is nothing in the Civil Code of Lower Canada which countenances the view that injunctions are intended to be given under its provisions in cases where injunctions would not be given by our Courts in England. Indeed the presumption is the other way. The remedy by specific performance or injunction is not one that originally formed part of the law of Quebec. It has been introduced in imitation of the law prevailing in England. The clauses of the Code of Civil Procedure relating to it were discussed at length on the hearing of the appeal, but their Lordships are of opinion that they afford no support for the contention of the appellants. They relied chiefly on Article 957 which specifically relates to interlocutory injunctions only, and which shows by its express language that it is dealing only with the procedure necessary to keep matters in an unchanged state during the period of the litigation so far as is necessary to prevent the final judgment from being rendered ineffectual. The absence of specific directions as to the cases in which injunctions will be granted points to an intention to follow the well-known rules of English Law on this subject which are based not on specific enactments but on the practical experience of Courts that have exercised the jurisdiction for centuries past and have thus arrived at the rules which it is necessary or prudent to follow. Their Lordships are of opinion that the law of Quebec

certainly does not go further than the English Law in these respects. It is not necessary in this case to decide whether it goes so far.

Their Lordships are, therefore, of opinion that the decision appealed from was correct, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

P. R. S.

Appeal dismissed.

A. I. R. 1914 Privy Council.

(FROM QUEBEC.)

4th August, 1914.

THE LORD CHANCELLOR, LORD MOULTON AND SIR CHARLES FITZPATRICK.

Edward Feltham Coates and others—Appellants

v.

The Sovereign Bank of Canada—Respondent.

Privy Council Appeal No. 8 of 1914.

Agency—Principal cannot do by an agent, what he cannot do himself—The powers of a general manager of a Bank cannot include the power of doing acts on behalf of the Bank, which would be ultra vires on its part—Canadian Bank Act, forbidding dealing by bank in capital stock of itself or other bank, contract of sale of shares entered into by bank general manager does not bind bank—Purchaser is not entitled to refund from the bank, of the money paid by him for the shares and credited to the shareholder from whom the shares were purchased—Banker and customer.

Mr. Stewart the general manager, on behalf of the respondent Bank entered into a contract with the appellants for sale to them of some shares of the Bank, and agreed to re-purchase them from the appellants, if they chose to sell them back within a year. But by the provisions of the Canadian Bank Act, banking companies incorporated under the Act, were forbidden from purchasing or dealing in their own capital stock, or the capital stock of any bank. A certain number of shares standing in the name of a shareholder of the Bank were duly sold to the appellants and the price paid by them by means of a draft by the Bank on them, was credited to the accounts of the shareholder.

Held (i) that to purchase shares of its own capital would have been an ultra vires act on the part of the Bank and consequently Mr. Stewart was not in fact its agent to make a contract on its behalf to purchase its shares either absolutely or conditionally. For, the Bank could not make a man its agent to do an act which it could not itself do, by virtue of the limitations imposed on it by its charter of incorporation. [P. 255, C. 2.]

(ii) The fact that Mr. Stewart was general manager cannot make him an ostensible agent, with wider powers than belong to a general

manager by virtue of his position, and those powers cannot include the power of doing acts on behalf of the Bank which would be *ultra vires* on its part. The Bank was therefore in no sense a party to the contract. [P. 255, C. 2.]

(iii) The payment of purchase-money by means of a draft was adopted merely for convenience and the rights of the parties were the same as if payment had been made by cheque or gold. The Bank received the money in its ordinary course of business (i.e.) as payment made to it in favour of a customer and discharged itself of such payment when it credited the money to the account of the customer. The payment having been made in purchase of shares which was duly carried out, there was no breach of any duty on the part of the Bank and the appellant was not entitled to refund of his money from the Bank. [P. 256, C. 1.]

Lord Moulton:—The respondent, the Sovereign Bank of Canada, is a corporation (now in liquidation) incorporated under the Canadian Bank Act and having its head office in Montreal. Its general manager in the year 1906, which is the material date in the present case, was Mr. D. M. Stewart. By virtue of the provisions of the Canadian Bank Act, no banking company incorporated under it may purchase or deal in its own capital stock nor indeed the capital stock of any bank.

In September, 1906 Mr. Stewart was in England and met Mr. Hanson, who was a partner in the appellant firm (which is the well-known firm of English stock-brokers who do business under the firm name of Coates, Son and Company), and suggested to him that the appellants should take an interest in his bank by buying a block of its stock. Mr. Hanson agreed to do so on certain terms. The letters that passed between the parties relevant to these terms are as follows:—

On 14th September 1906, Mr. Hanson wrote to Mr. Stewart—

"DEAR MR. STEWART,

"I THINK it is desirable that you should write us a letter embodying the terms to which you agree in the event of our purchasing the 539 shares and I think one of the features was an undertaking on your part to take the shares back at our option within twelve months at 139"

and on 18th September 1906, he received from Mr. Stewart the following reply.

"Messrs. Coates, Son & Co.

"DEAR SIR,

"REFERRING to my conversations with your Mr. Hanson, I beg to confirm the sale to you of five hundred and fifty (550) shares of stock in the Sovereign Bank of Canada at 138 net. It is understood that I will repurchase these

' shares from you at your option at any time within one year from this date at 139.'

These documents represent a transaction between the appellants and Mr. Stewart personally. The Bank is not mentioned therein. But it is contended that the oral testimony of Mr. Hanson shows that Mr. Stewart made the contract on behalf of the Bank as its agent. In the opinion of their Lordships, the evidence to this effect is but slight, and the Courts below have found that the contract was made with Mr. Stewart personally. But though slight, the evidence shows that Mr. Hanson, in all good faith, took it that Mr. Stewart was acting on behalf of the Bank as his principal in the matter, and as in their Lordships' opinion it is not necessary to decide the point, they will assume in favour of the appellants that the contract made actually by Mr. Stewart purported to be made by him on behalf of the Bank.

The appellants duly obtained the shares, and paid for them by a draft for 15,595*l.* 17*s.* 11*d.* drawn by the defendant Bank on the appellants, dated September 29th, 1906, and duly honoured at maturity. The proceeds of this draft were placed to the account of one L. P. Snyder with the Bank, and the shares were taken from shares then standing in his name in the stock ledger, and were transferred by him to the appellants or their nominees.

During the following year the Bank got into difficulties and the market value of its shares fell considerably. In June, 1907, the appellants wrote to Mr. Stewart and to the Bank announcing their intention to exercise their option to require the shares to be taken back at 139. By that time Mr. Stewart had ceased to be general manager and had been succeeded by Mr. Jemmett. The reply which they received from the Bank was as follows:—

" Messrs. Coates, Son & Co.

" DEAR SIRS,

" We beg to acknowledge receipt of your letter of the 25th ultimo enclosing a copy of a letter which on the 1st instant you forwarded to Mr. D. M. Stewart.

" Mr. Stewart forwarded the original of this letter to the writer, but it was at once returned to him with the statement that it referred to a matter with which the Bank had and could have nothing to do.

" The Canadian Bank Act strictly prohibits any bank in Canada from purchasing or dealing in

the shares of its capital stock, and therefore any undertaking which Mr. Stewart may have given with respect to any shares in this Bank's stock which he may have sold to you cannot bind the Bank in any way whatever, and is simply a personal matter between Mr. D. M. Stewart and yourselves"

and to the position thus taken up the Bank has consistently adhered.

Thereupon the appellants, on October 25th, 1907, brought the present action against the Bank and Mr. Stewart, in the Superior Court of Quebec, claiming specific performance of the undertaking to take back the shares, or in the alternative the return of the money paid by them with \$550 damages, being one dollar per share. Mr. Stewart did not contest the action, and judgment accordingly went against him. The Court decided in favour of the defendant Bank, and dismissed the action as against it. From that decision an appeal was brought to the Court of King's Bench for the Province of Quebec (Appeal Side), and was dismissed with costs. It is from the decision of that Court dismissing the appeal that the present appeal is brought.

Their Lordships are of opinion that neither of the claims set forth in the appellants' declaration can be supported, and that the judgments of the Courts below dismissing the action as against the Bank were right.

With regard to the claim based on the contract, it is evident that to purchase shares of its own capital stock would have been an *ultra vires* act on the part of the Bank, and consequently Mr. Stewart was not in fact its agent, to make a contract on its behalf, to purchase its shares either absolutely or conditionally. The Bank could not make a man its agent to do an act which it could not itself do by virtue of the limitations imposed on it by its charter or incorporation. Nor is there here any case of ostensible agency. The only "holding out" that is suggested is that Mr. Stewart was the general manager of the Bank (as in truth he was), and that fact cannot make him an ostensible agent with wider powers than belong to a general manager by virtue of his position, and those powers cannot include the power of doing acts on behalf of the Bank which would be *ultra vires* on its part. The Bank is, therefore, in no sense a

party to the contract. If it was made by Mr. Stewart in its name, it was without authority, and it is not liable under it in any way.

Nor is the claim for the return of the money sustainable. The money was in fact paid by a draft, but their Lordships are of opinion that this mode of payment was adopted merely for convenience, and that the rights of all parties would have been the same if it had been paid by a cheque or in notes and gold. It was received by the Bank in the ordinary way of business and it did with it precisely what it was directed to do. It was received by Mr. Stewart under the contract as the price of the shares, and was credited to the account of Mr. Snyder who transferred the shares to the appellants who still hold them. The Bank did not receive the money in any other manner than it receives any payments made to it in favour of a customer, and it discharges itself of such payment when it duly credits the money to the account of the customer. In the present case the payment was made in purchase of the shares and that purchase has been duly carried out. The breach that has been committed, which alone entitles the appellants to relief, is the breach of the undertaking to repurchase the shares. Mr. Stewart alone is responsible under this undertaking, and the appellants have already obtained judgment against him for the breach of it. The Bank is not responsible under it in any way, and its connection with the matter consists only in the fact that it received money in the ordinary course of business and placed it to the account of the customer as duly directed to do.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs.

T. S. N.

Appeal dismissed.

**** A. I. R. 1914 Privy Council.**
(FROM CANADA.)

9th November, 1914.

LORDS DUNEDIN AND MOULTON AND
SIR JOSHUA WILLIAMS.

Adam Uffelmann—Appellant

v.

*The Stecher Lithographic Company and
others—Respondents.*

Privy Council Appeal No. 135 of 1913.

** (a) Privy Council—Practice—Question of fact—Covenant findings by the lower Courts—The Privy Council must be clearly convinced that the evidence cannot possibly support the findings, before it can come to opposite conclusion.*

On a question of fact the Trial Court came to a particular conclusion and all the members of all the three Appellate Courts agreed with the Trial Court.

Held, that in the face of such a consensus of opinion on a matter truly of fact, their Lordships would require to be clearly convinced that the evidence could not possibly lead to that result before they came to the opposite conclusion.

*** (b) Provincial Insolvency Act, (111 of 1907) S. 37—Under S. 2, sub-S. 1 and 2—Assignments and Preferences Act (Ontario) property may be mortgaged for money actually received but mere device to favour a particular creditor is voidable at other creditors' instance.*

The Ontario Seed Company was in August, 1909 indebted to the Merchants Bank of Canada in the sum of \$ 8,254. In respect of this sum Jacob Uffelmann Secretary-Treasurer of the company and brother of the appellant was liable to the Bank as surety. On the 12th August, 1909, the company executed a chattel-mortgage for \$8,300, of all their effects including book debts—which the Bank held as security—in favour of the appellant in return for which they got from him a cheque for \$ 8,300 and paid off their debt to the Bank. It was proved that the whole of the money to honor the cheque given by the appellant was really found by his brother Jacob, that the whole arrangements were made by him and that the appellant was a passive spectator who merely allowed his name to be used.

Held, any person however insolvent is entitled to give his property in security for money actually received. But it having been found that the advance of the money was a mere device to secure a preference to Jacob (he getting rid of his old liability as surety and getting hold of the whole assets of the company), and to hinder other creditors as in a question with the favoured creditor. Adam who was merely Jacob under another name, the transaction fell under Section 2, sub-Sections 1 and 2 of the Assignments and Preferences Act of Ontario, and was voidable at the instance of the creditors. *Forecraft v. Devonshire*, 2 Burr. 942, Ref.

"A notion that lending money to traders, knowing them to be in dubious, tottering, or distressed circumstances, upon mortgages or liens is fraudulent, and contract, void in case a bankruptcy ensues would throw all mercantile dealing into inextricable confusion."

Quaere.—Whether the amendments made to the Statute of Elizabeth, in Ontario have had the result of altering the essence of challenge under that Statute, which is, the debtor retaining a benefit for himself.

Lord Dunedin.—The Ontario Seed Company, Limited, was in August, 1909, indebted to the Merchants Bank of Canada in the sum of \$ 8,254. In respect of this

sum Jacob Uffelmann, Secretary-Treasurer of the Company, and brother of the appellant, was liable to the Bank as surety under a bond and as indorser of notes discounted by the company to the extent of \$7,700. The Bank also held as security an assignment of the book debts of the company.

On 12th August, 1909, the Ontario Seed Company executed a chattel mortgage for \$8,300, of all their effects, including book debts, in favour of the appellant, in return for which they got from him a cheque for \$8,300, which was then paid by them to the Merchants Bank, thus paying off the debt of \$8,254.

The respondents were as at that date, and are still, creditors of the company, and in December, 1909, they on behalf of themselves and other creditors raised this action to set aside the chattel mortgage in respect of the provisions of the Statute of Elizabeth and of the Act Ch. 147 of 1897 of Ontario respecting assignments and preferences of insolvent persons.

The action was tried by Mr. Justice Tetzl. It was proved that the whole of the money to honour the cheque given by the appellant was really found by his brother Jacob, and that the whole arrangements were made by him, the appellant being no more than a passive spectator who allowed his name to be used. It was also proved that at the time of the transaction the company was insolvent to the knowledge of Jacob.

In the circumstances the Trial Judge, who saw the witnesses, found as follows:—

"I find as a fact that, when the chattel mortgage was executed, the company, through its officers, Otto Herold, Vice-President, and Jacob Uffelmann, Secretary-Treasurer, knew that the company was insolvent, and that the company, through the said officers, when they executed the chattel mortgage in the name of the company, intended thereby to defeat, hinder, delay, or prejudice all the creditors of the company except the Merchants Bank and Jacob Uffelmann; and further, that it was the intention of the company, through the said officers, to defeat the objects of the said Act by raising the money advanced under the chattel mortgage to pay the claim of the Merchants Bank, and by paying the same to give an unjust preference to the bank and Jacob Uffelmann, as surety."

He also said:—

"I do not think under all the circumstances that the money could be said to have been given to the company in good faith."

He accordingly set aside the chattel mortgage but directed that allowance should be made to the amount of the book debts which the Bank had as security at the time of the transaction.

Appeal was taken to the Divisional Court, which affirmed the judgment on the main question, but set aside the rider as to the allowance of book debts. Appeal was then taken to the Court of Appeal which took the same view as the Trial Judge, and finally appeal was taken to the Supreme Court of Canada, which took the same view as the Divisional Court.

The case seems to their Lordships to turn upon a question of fact and of fact alone. Had the present appellant been a third party there can be no doubt that the transaction would have been unimpeachable in spite of the insolvency of the Company. For it is the case that money actually passed; and any person, however insolvent, is entitled to give his property in security for money actually received. As Lord Mansfield said in the case of *Foxcroft v. Devonshire* (1).

"A notion that lending money to traders knowing them to be in dubious, tottering, or distressed circumstances, upon mortgages or liens is fraudulent, and consequently the contract, void in case a bankruptcy ensues, would throw all mercantile dealing into inextricable confusion."

But the moment it is found that the appellant Adam is truly Jacob under another name, a question of fact becomes open for solution; and that question is whether the advance was a *bona fide* payment (there is no doubt it was an *actual* payment), or whether it was not a mere device to secure a preference to Jacob (he getting rid of his old liability as surety, and getting hold of the whole assets of the company), and to hinder other creditors as in a question with the favoured creditor Adam who was merely Jacob under another name. Now as to this question the Trial Judge had no doubt on the evidence as laid before him, and all the members of all the three appellate Courts have agreed with him. In the face of such a consensus of opinion on a matter truly of fact their Lordships would require to be clearly convinced that the evidence could not possibly lead to that result before they came to the opposite conclusion. This seems to end the matter; for in other words it is a finding

that the circumstances of the case do not bring it within any of the cases set forth in Section 3, sub-Section 1 of the Assignments and Preferences Act. That allows Section 2, sub-Sections 1 and 2 to operate and the learned Judges below have all held that the transaction falls within the words of both sub-Sections.

Their Lordships do not wish to express any opinion as to whether had there not been proved insolvency the transaction could have been avoided under the Statute of Elizabeth. The essence of challenge under that Statute has been held in England to be the possibility of showing that, to use the words of Jessel, M. R., in *Middleton v. Pollock*, (2) the debtor retains a benefit for himself. The Statute of Elizabeth as it exists in England has been altered so far as Ontario is concerned by certain amendments. But it is matter for consideration whether the amendments have had the result of altering what has been just expressed as the criterion to be applied to transactions alleged to fall within the Statutes.

In the present case their Lordships think for the reasons given that the transaction is impeachable under the Assignments and Preferences Statute; and they see no reason to doubt that the measure of relief is that given by the Supreme Court of Canada. They will therefore humbly advise His Majesty to dismiss the appeal with costs.

T. S. N.

Appeal dismissed.

(2) 2 Ch. D. 104.

**** A. I. R. 1914 Privy Council.**

(FROM ONTARIO.)

21st July, 1914.

THE LORDS CHANCELLOR, MOULTON,
AND SUMNER.

Elias Smith and others—Appellants

v.

Seth S. Smith and Dale M. King—Respondents.

Privy Council Appeal No. 44 of 1914.

****Will—Construction—Codicil making additional provision in favour of one of the legatees under the will—Supersession of other bequests in will—Intention not unambiguously expressed—Dispositions in will will not be affected.**

Where a codicil to a will made with the intention of adding to the provision in the will in favour of the daughter of the testator gave the daughter a minimum life income and *inter alia* stated that this bequest to the daughter was to supersede all others made in the will.

Held, that the material words of the codicil not being as clear as the language of the will, it could not be construed as establishing a revocation free from doubt of the other dispositions in the will in favour of the other legatees which would therefore stand. [P. 261, C. 1.]

If a devise in a will is clear, it is incumbent on those who contend it is not to take effect by reason of revocation in the codicil, to show that the intention to revoke is equally clear and free from doubt as the original intention to devise; if there is only a reasonable doubt whether the clause of revocation was intended to include this particular devise then such devise ought to stand. *Hearle v. Hicks*, (1 Cl. & F. at p. 24) Foll.

[P. 260, C. 2; P. 261, C. 1.]

Lord Sumner:—On 12th March, 1913, John David Smith as executor of the will and codicil of his deceased wife, Emma Josephine Smith, moved the High Court Division of the Supreme Court of Ontario for the determination of certain questions which had arisen in the administration of her estate. He joined as defendants to the motion his three sons, Elias, Vernon, and Carl, and Dale M. King, the husband of his deceased daughter Bertha, as executor of her estate. John David Smith has since died and his place has been taken by Seth S. Smith, as executor and trustee of his will, but the contesting parties are his three sons on the one hand and on the other the legal personal representative of his deceased daughter.

Mr. Justice Middleton decided for the sons. On appeal the Appellate Division of the Supreme Court of Ontario reversed his decision but granted leave to appeal to His Majesty in Council.

The testatrix, Emma Josephine Smith, died on 9th August, 1896, having made her will in 1889, with a codicil made in 1894. At the latter date Bertha, her only daughter and youngest child, was in her fifteenth year, and Vernon, her next older child and youngest son, was about twenty-one. Bertha did not marry till she was thirty-one. She survived her marriage only about a twelve month, and her husband Dale M. King survived her and proved her will.

It is evident that Mrs. Smith's will was the work of a lawyer and, so far as concerns the present appeal, it was perfectly clear. It began with a series of specific bequests by which Mrs. Smith divided

some silver goblets and other articles among her four children, and gave to Bertha most of her trinkets and jewellery. Some property, which came to her on the death of one Robert Charles Smith, was left to her husband, in trust for himself for life and after his death for the benefit of her children equally, each child becoming entitled on attaining twenty-one.

She next disposed of her household furniture and effects, her books and pictures, piano and so forth equally among her children, the delivery of the several shares to take place on her death, with a power to her executor to postpone, but not beyond the times at which each child should attain twenty-one.

It was a common feature of both these dispositions that her grandchildren should stand in the place of their parents dying before the periods respectively fixed for the operation of the gift. Then came a gift of the residue of real and personal estate to her husband as trustee, in trust to apply the income, first, for the education and maintenance till the age of twenty-one of such of her children as should be minors at her death; next, to making up her husband's income from Robert Charles Smith's property to \$600 per annum; and then, subject to setting aside enough to secure this accretion to him for life, in trust to convert into money and divide the proceeds among her children equally (grandchildren again standing in the place of children deceased), as soon as her youngest child for the time being should attain twenty-one. As all Mrs. Smith's children survived her and came of age, Bertha thus became entitled to a vested share of this residue under the will in 1901. Their Lordships were informed that part of this residue consists of real property in Toronto, which has considerably increased in value of late years.

The short question is whether Bertha Smith's share in this residue which vested by the terms of the will, was taken away by those of the codicil. Her brothers are of course concerned to say the latter, and her husband to maintain the former, and a substantial sum depends on the answer.

The codicil, by whomsoever drawn, is not the work of a lawyer but it affects a legal style and employs some terms of art, a fertile source of confusion. It must have been carefully considered,

and was the fruit of much thought. No doubt the testatrix knew what she wanted, so far as she could anticipate events that might occur, but probably she failed to exhaust the different ways in which questions might arise. With her, as with other testators, knowing what she wanted and saying what she meant were probably very different things.

The codicil begins thus, "not feeling satisfied with the provision made in my will for Bertha Hope Smith, my only daughter, I hereby add this codicil." These words are only introductory and are far from being conclusive, but they establish at the outset two things, that the testatrix had her will in mind, and that her dissatisfaction was not with her will as a whole, but only with her daughter's share under it. She could only increase her daughter's share at the expense of the other beneficiaries, but that was no reason for wishing practically to make a new will. The codicil is intended to "add"; it does not start with an intention to take away.

She then gives her daughter, Bertha, a minimum income for life, diminishing if she marries before attaining twenty-five. The general sense is clear, though there are several difficulties, which need not now be discussed. They serve to contrast the lucidity of the will with the obscurity which naturally arises from altering such a will by means of a codicil without a lawyer's help. The crux of the case is that part of the codicil which deals with the dispositions of the testatrix on and after Bertha Smith's death. This runs as follows:—

"Whatever my estate realises over and above the payment of this bequest to Bertha and the provision made for my husband and executor, J. D. Smith—in my will—is to be equally divided between my surviving sons or their surviving child or children as provided in my will."

"This bequest to Bertha is to supersede all others made in my will, with one exception of the provision made for J. D. Smith, my husband."

"Following the bequest to Bertha I solemnly charge my executor or executors with a provision for Vernon's education or profession until he attains the age of twenty-five years,"

Mr. Justice Middleton held and declared that by these words, "the whole will is revoked except in so far as it provides for the husband," and that the reference to "the surviving sons of the testatrix or their surviving child or children as provided in the said will," was only a compendious way of providing in the codicil that grandchildren should take in a certain event, and did not keep any provision of the will alive as such.

On this construction the testatrix swept away all the specific bequests, which carefully divided her personal valuables among her four children, and these things fell into residue. It swept away dispositions, the differences in which as to vesting and so forth showed that they had been the subject of anxious consideration, and this as regarded the sons and not the daughter Bertha only. As Bertha's \$ 600 per annum is to be "paid her out of my estate," there could be no division of the corpus till her death, for the whole of it might some day be needed for her annuity, and then the division is to be among "my surviving sons," that is obviously the sons who survive their sister, not those who survive their mother. Yet there is a charge for Vernon's education during the next four years, which, failing a surplus of income, he could only enjoy, if his sister died before that time expired. If Bertha leaves children they get nothing, unlike their cousins who survive their parents. This is a drastic change indeed, and all because the testatrix was not "satisfied with the provisions made in my will for Bertha," and wished to "add" a codicil. There can be little doubt that this interpretation proves too much.

It is mainly, though not exclusively, rested on the word "supersede." If single words are to be examined narrowly, though "all other bequests in my will" are "superseded," the devises contained in it are not, which would leave a good part of the will standing. On the other hand, if the testatrix used the word "bequests" without exactly knowing what it meant, why should it be held that she used the word "supersede" in the sense in which it is used ordinarily and correctly, and not in some loose sense of her own?

Again, if this construction prevails, what is the meaning of the words "unless the income realised through or by my property on division should yield more to each surviving child or children," and "should such be the case, then I authorise such division to be made, Bertha having attained the age of twenty-five years as aforesaid"? "They would appear to make the corpus divisible in one clause on Bertha's twenty-fifth birthday and only on the day of her death in the other. Nor does this exhaust the difficulties. Reliance is placed on the words "whatever my estate realises over and above the payment of this bequest to Bertha and the provision made for my husband . . . is to be equally divided between my surviving sons," as pointing to a division of corpus, taking place only on Bertha's death, from which any children of hers are excluded, and not to a mere division of surplus income, as if it ran "whatever income my estate realises . . ." and so forth. If so, the difficult clause "This bequest to Bertha is to supersede all others . . ." is mere surplusage: all that it can effect has been effected already. It is not, however, necessary to pursue the anomalies which arise on the appellants' construction.

Upon appeal the Appellate Division reversed the order of Mr. Justice Middleton, and rightly so, as their Lordships conceive. Some of the judgments contain passages and put interpretations upon particular words, with which their Lordships are not prepared to agree, nor are they confident, as the learned Judges were, that an interpretation can be found which would reduce the whole of this codicil to consistency and clearness. It is not, however, necessary to solve all these questions for the purpose of this appeal.

It is a well established rule as stated by Tindal, C. J., in advising the House of Lords in *Hearle v. Hicks* (1) that "if a devise in the will is clear, it is incumbent on those who contend it is not to take effect by reason of a revocation in the codicil to show that the intention to revoke is equally clear and free from doubt as the original intention to devise; for if there is only a reasonable doubt

(1) 1 Cl. and F. at p. 24.

whether the clause of revocation was intended to include this particular devise, then such devise ought undoubtedly to stand." The present case falls, if not within the exact words, entirely within the spirit and substance of this rule.

Their Lordships are of opinion that the meaning of the material words in the codicil, if any (and some may be beyond reconciliation with the rest), is so far from being as clear as the language of the will, and is so far from establishing a revocation free from doubt of Bertha Hope King's interest in the corpus under her mother's will, that the disposition of the will in her favour undoubtedly ought to stand. They will accordingly humbly advise His Majesty that the order appealed from was right and that this appeal ought to be dismissed with the like order as to payment of costs out of the estate as was made by the order appealed against.

P. R. S.

Appeal dismissed.

**** A. I. R. 1914 Privy Council.**

(FROM THE GOLD COAST COLONY.)

21st July, 1914.

LORDS KINNEAR, SHAW AND PARMOOR.

Atta Kwamin—Appellant

v.

Kobina Kufuor—Respondent.

Privy Council Appeal No. 94 of 1912.

(a) *Privy Council — Practice — Concurrent judgments of Courts below by Judges better placed than P. C. to know native customs etc. — Not to be reversed unless for apparent blunder or error in the way of dealing with the facts.*

In a case where the Judges of the Courts below from their familiarity with the customs and sentiments of the natives had an advantage for dealing with the evidence which was wanting to the Judicial Committee, the Privy Council would not reverse the concurrent judgments of the two Courts, unless it be shown with absolute clearness that some blunder or error was apparent in the way in which the Judges below had dealt with the facts. [P. 261, C. 2]

(b) *Contract—Ignorance or mistake in execution—Contract in language foreign to the parties—Presumptions to be applied in such cases—Signature in excusable ignorance—No binding Contract between parties.*

If a party to a document subscribed without negligence in the honest belief that it is a document of a totally different nature, it is not binding upon the subscriber, not by reason of fraud or misrepresentation, but because the mind of the signer did not accompany his signature. If

he is excusably mistaken as to its actual contents he never intended to sign and in law he never did sign the paper. But when a person of full age signs a contract in his own language his own signature it raises a presumption of liability so strong that it requires very distinct and explicit averments in order to subvert it. But there is no presumption that a person who does not understand English and cannot read or write, has appreciated the meaning and effect of an English legal document, because he is alleged to have set his mark to it by way of signature.

(c) [Contract Act, S. 196.]—*Contract made by agent—No antecedent authority—Consideration of how far agreement was acted upon is material.*

The question was whether an agent who was alleged to have made an agreement on behalf of another was empowered to make it.

Held, that a subsequent acceptance by the principal would have bound him as effectually as an antecedent mandate and that therefore it had been rightly thought material by the lower Court to consider how far the agreement had been acted upon, there being no evidence that the agent had any antecedent authority to enter into it.

Lord Kinneer :—Their Lordships have seen no sufficient reason for disturbing the judgment in this case. It raises some questions of considerable difficulty. But the difficulties are occasioned by the obscurity of the facts; and the learned Judges below, from their familiarity with the customs and sentiment of the natives, have an advantage for dealing with the evidence which is wanting to this Committee. In such a case, it would not be consistent with an approved rule to reverse the concurrent judgments of two Courts, unless "it be shown with absolute "clearness," to use the language of Lord Herschell, "that some blunder or error is "apparent in the way in which the learned "Judges below have dealt with the facts." It is true that Lord Herschell's rule applies in terms to those cases only in which the judges have been unanimous; and one of the Judges of the Court of Appeal has dissented in the present case. But this ought not to detract from the weight which is due to the opinion of the majority on the matter of fact, since the dissent is not based on a different view of the evidence, which indeed the learned Judge has hardly considered, but upon grounds of law which their Lordships are unable to adopt.

The controversy relates to certain lands called Bibianiha in the Western Frontier district of the Gold Coast Colony; and the question to be decided is whether the

respondent Chief of Enkawie, who was plaintiff in the action, is bound by an agreement alleged to have been made in 1899 in the name of his predecessor Ntwiegye the younger, who was then chief, to surrender in favour of a chief styled Kwasio Tinney, of Pataboso, in the district of Sefwhi, all right and title in the lessor's part of a lease of gold mines, and in the property of Bibianiha comprised in it. Chief Ntwiegye was not himself a party to this agreement, nor was he present when it was made, but he is said to be sufficiently described as the Chief Aichil Aigay, which is supposed to be an *alias* of Ntwiegye, and to have been represented by his linguist Kojo Badu, who signed the memorandum of agreement, by making his mark, or touching the pen with which the mark had been made. The memorandum recites that a lease for 99 years had been made in 1891 by Chief Kwasio Tinney of certain gold mines within the lands of Bibianiha in Sefwhi to Dr. Arthur Mather Kavanagh, since deceased, and purports to record an agreement whereby "in consideration of the sum of 300*l.* to be paid on or before the 10th of May, 1899 by the Chief Kwasio Tinney to Kojo Badu, for and on behalf of the Chief Aichil Aigay, the latter chief recognises the lease and withdraws all claims, demands, rights, titles, privileges, advantages, benefits to and arising from the afore-mentioned lease and the Bibianiha property comprised therein." This is badly expressed, but if the agreement be valid there seems to be little room for question as to its meaning and effect in law. It assumes a right or at least the assertion of a right on the part of the Chief of Enkawie to give or withhold a lease of Bibianiha property, which he exercises by recognising a lease already granted by Tinney, and thereupon it makes him surrender absolutely and completely in Tinney's favour, not only the lessor's interest in the lease just confirmed, but all right and title whatever in the property of Bibianiha. This being the alleged agreement, the respondent has no fault to find with it in so far as it recognises this lease of 1891. On the contrary his case is that the lease was originally granted with the authority of his predecessor Ntwiegye who never disputed its validity, but consistently maintained his right as the true lessor to the rents payable

by the lessee. But he maintains that in so far as it surrenders the rights of Enkawie it is invalid and ineffectual, and this on two grounds, first, that Kojo Badu had no authority to surrender his chief's rights or to dispose of property belonging to his stool of Enkawie, and secondly, that he did not understand the memorandum of agreement and did not know what he was doing when he was made to sign it. These are separate and distinct grounds in law, but they are both resolvable into questions of fact, and before considering either separately, it will be convenient to examine the circumstances out of which the transaction arose, and the conditions under which the memorandum was executed.

The lands of Bibianiha are at some distance from Enkawie, and since the delimitation of the frontier in 1906, they have been placed within the Gold Coast Colony, whereas Enkawie is in Ashanti. The origin and early history of the Enkawie right are not clearly brought out in evidence. But it is proved that for a considerable, if indefinite, period before 1891, when the lease to Kavanagh was granted, the respondent's predecessors as Chiefs of Enkawie held the lands as part of the possessions of their family stool, and exercised their right of ownership by levying rents or tribute from members of other tribes whom they permitted to occupy them. Among these were natives of a tribe called Appolonians, who came upon the land to mine for gold. They explained their object to the people of Sefwhi, whose territory is immediately adjacent to Bibianiha; Eduampon, the Chief of Sefwhi, reported the matter to the Chief of Enkawie, who gave permission to the Appolonians to work the gold upon the Bibianiha lands. In return they paid a certain proportion of the gold extracted to the Sefwhi Chief, who paid over one half as tribute to the Chief of Enkawie. But, the actual collection for this purpose seems to have been generally made by a Sefwhi tribesman named Kwasio Tinney as representing his chief. Matters were in this position when, in 1890, Dr. Kavanagh appeared on the land in search of a mining concession. This was reported by Tinney to Ntwiegye of Enkawie, who consented to a lease being given to Kavanagh for mining purposes. The lease referred to in

the minute of agreement above mentioned was accordingly granted for 99 years at a rent of 300*l.* a year. It is made in favour of Kavanagh and his assigns, and before the date of the alleged agreement it had passed into the hands of an English Limited Company, the Bibiani Goldfields Company, who still hold it by a title which is not disputed by either of the parties to this litigation. On the face of it Tinney appears as lessor, but there can be no question that it did not in reality proceed upon any exclusive title in him, but was granted by him, with the authority of the Chief of Enkawie and also of his own immediate chief, Yaw Gebill, of Sefwhi, who had by that time succeeded Eduampon. Tinney's name as lessor of course implies an assertion of a right and title to grant the lease, but not necessarily of an independent right of property in the lands comprised in it. If they belonged to Enkawie, the owner was Ntwiegye; if they belonged to Sefwhi, as the appellant maintains, the owner was Yaw Gebill; and both of these chiefs authorised the lease. Yaw Gebill did so by counter-signing the lease by his mark; and Ntwiegye did so orally before the lease was executed. This difference implies no admission of conflicting claims on the part of an Ashanti Chief, who knew nothing of the practice of creating or transferring rights by written documents. It must be admitted that in the absence of written title the nature and extent of the rights possessed by the Sefwhi chiefs are left in considerable obscurity. The learned Chief Justice is of opinion that neither Tinney nor the Sefwhi Chief can properly be called tenants, and there is evidence tending to show that they were caretakers for Enkawie. But however their right of occupation might be legally defined, the material point is that before the agreement of 1899 it was not an exclusive right of property. Nothing was done to relieve them of their liability to pay tribute to the Chief of Enkawie, or to derogate from his paramount right. The Court below has accordingly taken it as well established in evidence that at that date the ownership was still, as it had been for generations, in Ntwiegye of Enkawie, and that the only question for consideration was whether it had been effectually surrendered by the alleged agreement. This, indeed, is the

assumed basis of the agreement itself, which must be altogether ineffectual if Ntwiegye had no good title to confirm or reject the lease. From this point of view, the first question to be decided is whether the memorandum was, in fact, authenticated by Kojo Badu touching the pen. This is not in substance or effect the signature of a written contract, but a symbol of assent which must be proved by oral testimony, and the testimony is conflicting. The Court, however, has held it to be sufficiently proved that Kojo Badu touched pen after his mark had been made by a witness named Duncan, whom Captain Way, the manager of the British Company, appears to have called in for the purpose of attesting the execution of the document. This point, therefore, must be taken as decided in the appellant's favour. But it does not go far to solve the more important questions, whether Kojo Badu was empowered to make any such contract for his chief, and whether he knew the meaning of the paper which he was supposed to sign.

As to the first of these points, there is no evidence to prove that Kojo Badu had any antecedent authority to make a new contract with Tinney. At that time there was no dispute between Ntwiegye and Tinney. But the rents due by the English Company had been unpaid for several years, and according to the respondent's evidence, which the learned Judges have believed, the sole purpose for which Kojo Badu and certain elders of the tribe were sent to Cape Coast was to get the Enkawie share of these rents. It was argued that the respondent's own evidence shows that a contract of sale was intended, because he says that Badu was "told to go with Tinney to Cape Coast for the purchase-money of the Bibiani lands"; and it is said that purchase implies sale. But the respondent was speaking in Fanti, and without questioning the general accuracy of the Court interpreter, it can hardly be assumed that the native witness was using the words of his own language with exact reference to the conceptions of English law. It is evident indeed, from another passage in his evidence, that the distinction between a sale and a lease for 99 years, if he understood it at all, was not present to his mind, because he says that "when the land was leased to the white

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"man," Tinney did not go to Enkawie about the sale, but he sent messages, "and my ancestor permitted him to sell." No stress therefore can fairly be laid upon the mere use of such terms as purchase and sale in the mouths of native witnesses; and whatever may have been the respondent's understanding of their legal import, it is certain that he did not intend to suggest the notion that Ntwiegye had authorised a sale to Tinney. He makes it perfectly plain that his chief's instructions to Badu and his companions were that they should go along with Tinney to Cape Coast where they and Tinney together were to collect 1000*l.* from the white man, and to divide the money. Tinney was not expected to purchase the land and pay the price, but to collect overdue rents from the white man who was already in possession. For much the same reasons the statement of the appellant's witness Kwesie Barku that Ntwiegye's messengers were told "to sell the lands to Tinney," may be disregarded. This witness is discredited, by the comment of the learned Judges on his testimony as to the execution of the memorandum, and on this point he is thrown over by the appellant himself. On the other hand Mr. Justice Gough who saw and heard the witnesses, states expressly that he was favourably impressed by the evidence of the respondent. But assuming Barku's evidence to be perfectly honest, it is confused and self-contradictory. He agrees with the respondent that the 1,000*l.* for which Badu was sent was to be collected from the white man; and the notion of a sale to Tinney was probably a mere blunder'. At most, this is an ambiguous phrase which cannot be set up against the great weight of evidence tending to prove that when Ntwiegye gave his instructions to Badu there was no dispute with Tinney, and that "beyond telling Badu to go and get the money, Ntwiegye gave them no other instructions." This is entirely in accordance with all the probabilities. The Chief Justice points out with great force that there was "no reason why Kojo Badu should have been deputed to give away the Enkawie rights to Tinney." They were in agreement as to the white man's lease, and they were also agreed that his rents in which they were to share were in arrear. It was perfectly natural that they

should join in a demand on the white man; but it is not intelligible that Ntwiegye should desire to sell his right to Tinney, in consideration of something less than the share of rent which he would be entitled to recover, if he kept his land unsold. It is said that Badu would not have touched pen if he had not been authorised to consent to the agreement. But it is proved that Ntwiegye knew nothing of the agreement either before or after it was signed; and the evidence as to its execution by Tinney, and Badu is loose and unsatisfactory to the last degree. The best evidence has been lost by the death of both of these men. But the Courts below had to decide on the evidence actually adduced; and there is nothing in that to suggest that any negotiation took place between them, or that there was any reason for negotiation before the memorandum was put before them as a completed document, and the marks set upon it, which were to stand for their signatures. It was a document in the English language, and it was presented to them for signature by Captain Way, the manager of the English Company, in his house at Cape Coast, it was interpreted by a native clerk in his employment, and when it had been signed, neither the document itself, nor any copy of it was delivered to either of them. It was retained by Captain Way as his own document, and when the trial took place, it was still in possession of the English Company. It was obtained by Captain Way in return for payment of 900*l.* of arrears of rent, and it is manifest that its true purpose was to confirm his Company's right to the concession. Nevertheless, it purports to be a contract between Kojo Badu and Tinney; and that is said, not unnaturally, to be a singular form of instrument to adopt if the mutual rights of the two chiefs were not to be adjusted. But the learned Chief Justice observes, and this is a point on which his experience gives weight to his observation, that owing to the terms of the Concession Ordinance, Captain Way had a material interest to hold under a concession, dated before 1895. He thinks it "fair, therefore, to assume that Captain Way was anxious to retain the advantage given by the lease of 1891 rather than have a new joint lease from Ntwiegye and

"Tinney, dated in 1899." He considers that the rents were withheld until the agreement had been signed, and he adds, there "can be no doubt that the agreement was made by the European concessionaires for them and in their interest." It would have served that purpose if it had been no more than an explicit recognition of the lease that had been granted by Tinney; and in that case, it might have been within Badu's authority to sign it as representing his chief. But the question is whether he signed it in the full knowledge that it went beyond this purpose and made over to Tinney of Sefwhi, the Enkawie Chief's whole right, title, and interest in the Bibiani lands. It is very possible that superfluous words may have been inserted by an unskilful English draftsman with the notion that they would somehow make the confirmation of the lease more explicit or more effectual. But however this may be, there is not a shadow of evidence that they were inserted because of a new bargain between Badu and Tinney, or that their meaning and legal effect was explained to either of the natives. The only evidence tending to show that they understood the agreement at all is that it was read over to them in the Fanti language by a native of the Gold Coast named Kraku in the employment of Captain Way; and this is plainly not enough to show that they assented to it with an intelligent appreciation of its contents. Kraku, who is still alive, was not examined, as he ought to have been, and even if it be assumed that the Fanti language possesses an exact equivalent for each of the English legal terms which are brought together in the Memorandum, it cannot be supposed that Badu could appreciate the legal effect of a multiplicity of words expressing unfamiliar conceptions on their being once read to him. He had no legal adviser, and no English adviser of any kind to explain the document. It is very probable that he understood that the paper he was asked by the lessee to sign related only to the lease or to the rents which he had been sent to collect. It is not, however, proved that he acted under that impression. But the possibilities of misunderstanding are so obvious as to render it imperative on the appellant who alleges his intelligent consent to a

contract expressed in a language which he did not understand, to prove that it was clearly explained to him. For this purpose it was indispensable to examine Kraku, and the appellant's failure to put him in the witness-box is equivalent to an admission of his inability to prove his case by the best attainable evidence.

In these circumstances the learned Judges have rightly thought it material to consider how far the agreement has been acted upon, because a subsequent acceptance by Ntwiegye would have bound him as effectually as an antecedent mandate. The appellant relies upon a receipt appended to the agreement. But the value of the receipt depends on the same consideration as the validity of the contract. There is no other evidence that the sum of 300*l.* was paid to Ntwiegye as "the consideration" mentioned in the agreement. It is proved that he received a larger sum, but to account of the rent to which he claimed to be entitled. All the other evidence of subsequent conduct shows that neither Ntwiegye nor Tinney knew anything of an agreement by which the former had abandoned his rights in Bibiani. No copy of the agreement was given to either; and when Badu returned from his mission he told his Chief nothing about any such contract. He brought back with him 420*l.* as the Enkawie share of the 900*l.* of arrears paid by Captain Way, after certain deductions which it is immaterial to examine. Ntwiegye would therefore be left under the belief that his mission had been exactly accomplished. But a more material fact is that Tinney continued to recognise the Chief of Enkawie's right in the lands by paying over to him a share of the rents received from the lessees; and a number of letters have been produced in which he distinctly admits the right of Enkawie. The Judges also attach considerable importance to an event which occurred after the respondents' accession to the chiefship. The respondent had heard that a paper lease had been granted, and also that a cane or rod had been presented to Tinney by the European lessees inscribed with the words "Bibiani Gold Fields, Limited, to King Quesi Tinney, 1902." "By the native mind," says the Chief Justice, "this would be regarded as evidence that Tinney was owner of the land." But

on the respondent's demand, Tinney sent the cane to him, and agreed to send him the lease when he should obtain it from his lawyer, and the learned Judge says that "to anyone acquainted with the native mind this would indicate that Tinney knew that the respondent was the real owner of the land."

Notwithstanding these considerations, it is said to be a mere assumption that Kojo Badu did not know the terms of the contract. But this is inaccurate. The question is whether his knowledge is proved, and the respondent cannot be required to prove a negative. The learned Judges say in effect that the assertion that he signed the agreement in knowledge of its contents is so improbable that they refuse to believe it, on the evidence adduced. This is a perfectly legitimate method of reasoning; and it is impossible for their Lordships to say that they are so clearly wrong that their judgment must be reversed. But the respondent's case does not depend upon Badu's state of knowledge. It may be that this would afford no sufficient ground for setting aside a contract which Badu had been duly empowered to make, since in that case the Chief might well have been held to have taken the risk of his own agent's intelligence. But its true importance lies in the valuable light which it throws on the fundamental question of his power to bind the Chief of Enkawie. The learned Chief Justice says he is satisfied that Badu would not have signed away his chief's lands without orders to that effect; and that observation would have afforded a very strong argument to the appellant, if it had not been accompanied by a clear opinion that Badu did not understand what the agreement meant. It is material on the other hand to observe that if Badu's authority to contract is not proved by direct testimony, it is just as little to be inferred from any assertion implied in his consent to sign.

The dissent of Mr. Justice Earnshaw is, as he explains, based entirely on the contract. But the learned Judge assumes that the contract is binding which, with great respect, is the very question in dispute. The contract itself does not prove that one of the parties was empowered to bind a third person, nor that a native of Africa understood a legal instrument in

the English language. These are matters of fact which must be proved by the party who avers them. The respondent's case is not that a contract binding upon him should be set aside on the ground of fraud or misrepresentation, but that no contract was ever made which could bind him or his predecessor. So far as this rests on want of authority in the person professing to bind him, the law is perfectly clear. But in so far as it rests on mistake or ignorance it is by no means to be governed, as the learned Judge seems to assume, by the same considerations as a purely English contract. The principle of law is the same in both cases, but the presumptions of fact are widely different if a contract is subscribed, without negligence, in the honest belief that it is a document of a totally different nature, it is not binding upon the subscriber, not by reason of fraud or misrepresentation but because the mind of the signor did not accompany his signature. If he is excusably mistaken as to its actual contents he never intended to sign and in law he never did sign the paper to which his name or mark is appended. But then when a person of full age signs a contract in his own language his own signature raises a presumption of liability so strong that it requires very distinct and explicit averments indeed in order to subvert it. But there is no presumption that a native of Ashanti, who does not understand English, and cannot read or write, has appreciated the meaning and effect of an English legal instrument, because he is alleged to have set his mark to it by way of signature. That raises a question of fact, to be decided like other such questions upon evidence.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

P. R. S.

Appeal dismissed.

**** A. I. R. 1914 Privy Council.**

(FROM AUSTRALIA.)

28th January, 1914.

LORD CHANCELLOR, LORDS MOULTON,
PARKER OF WADDINGTON AND SUMNER.

The State of South Australia—Appellant

v.

The State of Victoria—Respondent,

Privy Council Appeal No. 49 of 1913.

***Interpretation of Statutes—Statute empowering His Majesty to erect a province, whose subjects shall be bound only by the laws of that province—Letters Patent issued under this statute defining the eastern boundary of the province as 141° east longitude—Letters Patent must be interpreted to have implied and authorised the delineation, on the actual surface of the earth, the effective boundary by an executive Act, which defines and represents the enacted boundary.*

Letters Patent, dated 19th February, 1836, of William IV read as follows:—"Whereas by an Act of Parliament passed in the fifth year of our reign entitled 'An Act to empower His Majesty to erect South Australia into a British Province or Provinces, and to provide for the colonization and government thereof' * * * * * it is enacted that it shall be and may be lawful for us * * * to erect * * * establish one or more provinces and to fix, the respective boundaries * * * * * we do hereby erect and establish one province to be called the Province of South Australia and we do hereby fix the boundaries of the said province in the manner following (that is to say) * * * * * on the east the 141st degree of east longitude * * * * *. There was much uncertainty as to this eastern boundary and in 1847 the States of South Australia and New South Wales by agreement marked out on the surface of the earth, the 141st. degree, to mark the boundary between them. From this time the boundary thus marked out from the coast to the River Murray was accepted and acted upon by both colonies. In 1850, the state of Victoria was constituted and the River Murray marked the northern boundary of this State. South Australia, which had always suspected the correctness of the boundary marked in 1847 tried to induce the State of Victoria for a new determination of the boundary, in vain. Then proceedings were instituted by South Australia against Victoria to settle the disputed boundary. It was contended that the Letters Patent of 19th February, 1836, had the force of a Statute of the Imperial Parliament and the boundary fixed by it had the same legal status and could not be altered by anything less than a Statute of the Imperial Parliament and as none existed, the boundary was as fixed by the Letters Patent of 1836.

Held, that so far as fixing the boundary is concerned the Letters Patent of 1836, have the authority of an Imperial Statute and no other Imperial Statute having modified them, their interpretation and validity stood now as they were at the time when they were issued. [P. 277, C. 1.]

But the contention of the appellant (South Australia) as to the interpretation of the Letters Patent was unacceptable. The meaning of fixing the boundaries of two provinces by an astronomical line such as the meridian is that the boundary should be such as fixes the rights and duties of people and their rulers and this can only be done by its fixing a boundary on the surface of the earth which divides the two.

[P. 277, C. 1 & P. 278, C. 2.]

To accept the interpretation of the appellant would be to create a 'no man's land' of finite breadth over which authorities of neither Colony

could exercise legitimate authority, and which although its breadth might be reduced as the advance of science diminished the probable error of the observations which marked the longitude on the surface of the earth, could never be wholly extinguished. [P. 278, C. 2.]

Therefore on well known principles of Interpretation of Statutes the Letters Patent must be taken to have implied and authorised the delineation and determination of the effective boundary on the surface of the earth by an executive Act.

[P. 278, C. 2.]

And the boundary line in this case being fixed after a sincere effort to represent as closely as possible the theoretical line assigned by the Letters Patent must be held to be authorized by them.

[P. 279, C. 1.]

Lord Moulton:—This is an Appeal by the State of South Australia from a judgment of the High Court of Australia, dated the 22nd day of May, 1911, in proceedings instituted by the State of South Australia against the State of Victoria substantially for the purpose of settling a disputed boundary between the two States. The portion of the boundary between the two States which is in question stretches northward from the coast to the Murray River.

The judgment of the majority of the High Court was in favour of the defendants, the State of Victoria, and accordingly on the 22nd day of May, 1911, the action was dismissed, and it is from this decision of the High Court that the present Appeal is brought.

In the course of the proceedings before the High Court the history of the question of the boundary between South Australia and Victoria was minutely examined both in respect of law and of fact, and all relevant documentary and oral evidence was adduced and is now to be found in the record and their Lordships feel that all the material that could be serviceable for deciding the question in dispute has been laid before them, and that in the argument of the Appeal the legal effect of the various Acts of Parliament, documents and acts of the Parties has been fully and ably discussed. The result of the discussion has been to lead their Lordships to the conclusion that the important questions involved can be decided on broad general principles independent of much that has thus been brought before them. In giving the reasons for their judgment on this Appeal their Lordships do not propose to refer to matter which does not bear directly upon those reasons, but their not referring to such matter must not be understood as meaning that in

their opinion it was not relevant or that it was not such as was proper to be brought forward in the case. The nature and importance of the dispute made it one in which it was of the highest importance that the tribunal should feel assured that all relevant material had been fully brought forward.

The history begins with the Act 4 & 5 William IV., c. 95, which was passed on the 15th August, 1834. The title of this Act is:—

“An Act to empower His Majesty to erect South Australia into a British Province or Provinces and to provide for the Colonization and Government thereof.”

The preamble of this Act is so important to the decision of the present case that it is advisable to cite it here in full. It reads as follows:—

“Whereas that Part of Australia which lies between the Meridians of the One hundred and thirty-second and One hundred and forty-first Degrees of East Longitude, and between the Southern Ocean and Twenty-six Degrees of South Latitude, together with the Islands adjacent thereto, consists of waste and unoccupied Lands which are supposed to be fit for the purposes of Colonization: And whereas divers of His Majesty's Subjects possessing amongst them considerable property are desirous to embark for the said part of Australia: And whereas it is highly expedient that His Majesty's said subjects should be enabled to carry their said laudable purpose into effect: And whereas the said Persons are desirous that in the said intended colony an uniform system in the mode of disposing of Waste Lands should be permanently established: Be it therefore enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same. That it shall and may be lawful for His Majesty, with the Advice of His Privy Council, to erect within that Part of Australia which lies between the Meridians of the One hundred and thirty-second and One hundred and forty-first Degrees of East Longitude, and between the Southern Ocean and the Twenty-six Degrees of South Latitude, together with all and every the Islands adjacent thereto, and the Bays and Gulfs thereof, with the Advice of His Privy Council, to establish one or more Provinces, and to fix the respective boundaries of such Provinces; and that all and every person who shall at any time hereafter inhabit or reside within His Majesty's said Province or Provinces shall be free, and shall not be subject to or bound by any Laws, Orders, Statutes, or Constitutions which have been heretofore made, or which hereafter shall be made, ordered, or enacted by, for, or as the Laws, Orders, Statutes, or Constitution of any other Part of Australia,

but shall be subject to and bound to obey such Laws, Orders, Statutes, and Constitutions as shall from time to time, in the manner hereinafter directed, be made, ordered and enacted for the Government of His Majesty's Province or Provinces of South Australia.”

By Clause II power is given to His Majesty with the advice of His Privy Council to make or to authorise and empower any one or more persons resident and being within any one of the said Provinces to make, ordain and establish all such Laws and to constitute such Courts and to levy such rates, duties and taxes as may be necessary for the peace, order and good government of His Majesty's subjects and others within the said Province subject to certain conditions set forth in such section.

The Act goes on to authorise His Majesty to appoint three or more fit persons to be Commissioners to carry certain parts of the Act into execution. It provides the Commissioners with a seal and empowers them to declare lands of the Province to be Public Lands open to purchase by British subjects and to make orders and regulations for the surveying and sale of such Public Lands; and finally by Section 23 His Majesty is empowered by and with the advice of His Privy Council to frame, constitute and establish a constitution of Local Government for any such Province.

While the above Act was in force, and acting under the powers given by the same, His Majesty William IV. proceeded to erect South Australia into a British Province. The Letters Patent embodying and for the purposes of this case constituting the Order in Council effecting this are dated the 19th day of February 1836 and read as follows —

“Whereas by an Act of Parliament passed: in the fifth year of our reign, entitled ‘An Act to empower His Majesty to erect South Australia into a British Province or Provinces, and to provide for the colonization and government thereof.’ After reciting that, that part of Australia which lies between the Meridians of the 132nd and 141st degrees of east longitude, and between the Southern Ocean and 26° of south latitude, together with the islands adjacent thereto, consists of waste and unoccupied lands, which are supposed to be fit for the purposes of colonization, and that divers of our subjects, possessing amongst them considerable property, are desirous to embark for the said part of Australia, and that it is highly expedient that our said subjects should be enabled to carry their said laudable purpose into effect, it is enacted that it shall be and may be lawful for us,

with the advice of our Privy Council, to erect within that part of Australia which lies between the Meridians of the 132nd and 141st degrees of east longitude, and between the Southern Ocean and the 26° of south latitude, together with all and every the islands adjacent thereto, and the bays and gulfs thereof, with the advice of our Privy Council to establish one or more Provinces and to fix the respective boundaries of such Provinces now know ye that with the advice of our Privy Council, and in pursuance and exercise of the powers in us in that behalf vested by the said recited Act of Parliament we do hereby erect and establish one Province to be called the Province of South Australia, and we do hereby fix the boundaries of the said Province in manner following (that is to say) on the north the 26th degree of south latitude on the south the Southern Ocean, on the west the 132nd degree of longitude, and on the east the 141st degree of east longitude including there in all and every the bays and gulfs thereof together with the island called Kangaroo Island, and all and every the islands adjacent to the said last mentioned island, or to that part of the mainland of the said Province provided always that nothing in these our Letters Patent contained shall affect or be construed to affect the rights of any aboriginal native of the said Province to the actual occupation or enjoyment in their own persons or in the persons of their descendants of any lands therein now actually occupied or enjoyed by such natives. In witness whereof we have caused these our Letters to be made Patent. Witness ourselves at Westminster the Nineteenth day of February, in the sixth year of our Reign."

"By Writ of Privy Seal."

It may be convenient in this connection to state what is the admitted position of the boundary contended for by Victoria. It is situated about two miles and a quarter to the west of the true meridian of 141° of east longitude, so that it is common ground that the Province of South Australia so bounded would be within the area in which the Crown was authorised to erect a British Province or Provinces under the Statute 4 & 5 William IV., c. 95.

In 1838 the Act 1 & 2 Victoria, c. 60 was passed to amend the Act 4 & 5 William IV., c. 95, by making certain alterations therein with regard to the powers of the Commissioners and other matters which are not relevant to the present appeal. Reliance was, however, put upon this Act by the appellants on the ground that in its preamble it refers to the erection of South Australia into a Colony under Letters Patent of the 19th day of February, 1836, and describes the boundaries in the same language as is

used in the Letters Patent themselves. The appellants contend that this is a statutory recognition that the eastern boundary of South Australia is the meridian of 141° east longitude, and that even if the Letters Patent themselves had not the force of a statute (which they contend such Letters Patent, in fact possessed by virtue of their being based upon the Statute 4 & 5 William IV., c. 95, and being an Act of the Crown authorised thereby) the effect of this reference to the boundaries in 1 & 2 Victoria, c. 60, would be to make the meridian of 141° east longitude the statutable boundary between the Provinces. A similar type of argument is put forward by the respondents, based upon similar references in documents of authority in which the reference is to the eastern boundary of South Australia at dates when a recognised boundary existed which was the same as that now contended for by Victoria and the respondents claim that this is an authoritative recognition of it as the *de facto* boundary. Their Lordships are not disposed to give much weight to arguments of this kind. It is beyond contest that the boundary as fixed by Letters Patent was the meridian of 141° east longitude, and that no one intentionally accepted or referred to any other line but this as the boundary, or that if any one did so his so doing would have no effect whatever. The real question in the case in their Lordships' opinion lies much deeper and cannot be affected by such references however made during the time when it was not known that the *de facto* boundary did not coincide precisely with the exact position of the meridian of 141° east longitude.

On the 30th day of July, 1842, the Act of 5 & 6 Victoria, c. 61 was passed. It is entitled an Act to provide for the better Government of South Australia. It repealed entirely the Acts 4 & 5 William IV., c. 95 and 1 & 2 Victoria, c. 60 with the saving clause—

"That all Laws and Ordinances heretofore passed under the Authority and in pursuance of the said recited Acts or either of them and that all things heretofore lawfully done in virtue of the said Acts or of either of them shall hereafter be of the same validity as if the said Acts had not been repealed"

with a reservation which is not relevant to the present appeal. The same may be said of the actual provisions of the Act

which substantially amount to a re-enactment of the provisions of the repealed Acts with various changes of detail as to the number of the Commissioners, and &c. The Act contains no specific reference to boundaries.

Reference was made in argument to two statutes relating to the sale of waste land belonging to the Crown in the Australian Colonies which were respectively passed in 1842 and 1846. They are 5 & 6 Victoria, c. 36, and 9 & 10 Victoria, c. 104. In their Lordships' opinion the sole relevance of these statutes is that they show that the sale and leasing of public lands in the Colonies were proceeding at this time, and were the subject of legislative regulation. The power of thus dealing with the lands of each Colony was in the hands of the Governor of the Colony in which they were situated subject to various rules and regulations made by the Crown. It is obvious, therefore, that it was a practical necessity that the boundaries of the various Colonies should be defined and known. But otherwise the provisions of these Acts do not bear upon the question before their Lordships.

By this time the practical difficulties arising from the uncertainty of the boundary between the two Colonies of South Australia and New South Wales were becoming manifest to the persons in authority in the Colonies themselves. On 30th September, 1844, Governor Grey, of South Australia, writes a despatch to the Colonial Secretary calling his attention to the very imperfect manner in which the eastern and western boundaries of the Provinces were defined. He suggests that the boundary of the meridian of 141° east longitude should be abandoned, and natural landmarks arising from the features of the country itself (mainly rivers and lakes) substituted therefor. Such an admitted departure from the boundary as fixed by the Letters Patent would certainly have required either Imperial legislation or an exercise of the prerogative of the Crown, if indeed the latter mode would have sufficed, a question which it is not necessary to decide. No proposal of this kind would be practicable without the assent of both Colonies, and therefore the Colonial Secretary submits the proposition to the Governor of New South Wales, who, although agreeing with Governor Gray's view of the necessity of

determining and clearly defining the boundary, does not accept his solution, and the suggestion was therefore abandoned.

From about this date commence the important steps that were taken by the two Colonies to put an end to the inconvenience arising from the uncertainty of the boundary between them. It is evident that the difficulty with regard to the administration of the law was making itself felt. The lands near the boundary were being taken up. In a letter of July 15th, 1846, from one of the Commissioners of the Crown Lands Office to the Colonial Secretary is to be found the following passage, which vividly illustrates this:—

"I would beg leave to call His Excellency's (*i. e.*, the Lieutenant-Governor) attention to the necessity of having the eastern boundary of the Province at least approximately defined as soon as possible. The country through which it passes is now occupied for 70 miles from the coast, and there are at least 12 or 14 settlers whose runs lie so near the boundary line that I considered my jurisdiction over them uncertain and, therefore refrained from interfering with them. The loss to the revenue is not the only evil resulting from the want of a defined boundary. A number of bad characters resort to this neutral ground, knowing that the police cannot interfere with them until the question of jurisdiction is determined."

That this description is not exaggerated is evident from a letter written about the same date by the Lieutenant-Governor of South Australia to the Governor of New South Wales, referring to murders in the vicinity of the undefined boundary.

The outcome of this state of things was that communications passed between the Governors of South Australia and New South Wales on the subject of the determination of the boundary by a joint survey. The exact nature of the steps taken is clearly seen from the documents before their Lordships. On 26th October, 1846, the Lieutenant-Governor of South Australia wrote to the Governor of New South Wales a letter enclosing a copy of a letter which he had received from Captain Frome, the Surveyor-General of South Australia. In such last-mentioned letter Captain Frome concludes as follows:—

"With regard to the second question—that of the method of marking out this meridian line—I would also recommend the adoption of the first plan proposed by Mr. Latrobe—that of confid-

ing the duty to a surveyor selected by the Government of New South Wales; as no possible good can result from the employment of two surveyors with their respective parties upon work which cannot be divided, and I have no surveyor in the department available for such duty except a serjeant of the Royal Sappers and Miners, who is at present fully employed in the triangulation."

"It would, however, I think be desirable that some person on the part of this Government should accompany the survey party, not as a surveyor or with any power to interfere with the details of the work, but to report, for the information of the Lieutenant-Governor, upon the progress of the work and the nature of the country through which the line may run."

"If His Excellency approves of this arrangement it would be advisable that rations, and such camp equipment as may be required should be provided for this gentleman by the Government of New South Wales, as forming part of the cost of the survey."

And the enclosing letter concludes thus:—

"The difference of a few seconds of longitude one way or other does not appear to me to be of any other importance than that, as the Imperial Parliament has decided that the Boundary shall lie on the 141st meridian of east longitude, it remains for us to ascertain that meridian by the best means in our power to prevent future litigation among the occupiers of the soil."

To this letter the Governor of New South Wales replied on 30th December 1846. The relevant part of the letter in this connection reads as follows:—

"I have now the honour to inform Your Excellency that in compliance with Captain Frome's suggestion that the work should be performed under the superintendence of this Government at the joint expense of both, I have directed a competent surveyor with a sufficient party to proceed to the mouth of the Glenelg and I have instructed the acting superintendent of Port Phillip to communicate to your Excellency the period at which the party may be expected to reach their destination, and I have further directed that the gentleman whom you propose to attach to this party on the part of the Government of South Australia shall be provided with food and camp equipage during the time he may be employed."

The person instructed by the Governor of New South Wales to make this survey was Mr. Wade, and the person instructed to accompany him on behalf of South Australia was Mr. White. Both appointments were made in January, 1847. Their Lordships have no doubt that under the difficulties of the situation Mr. Wade carried out his work in a very commendable way. He sent full reports of his progress, and there is abundant evidence that what he did met with

approval on all sides. When his survey reached the 36th parallel of south latitude he was obliged to suspend it for a while. The reports of Mr. White, who accompanied him on behalf of South Australia, show that he was in complete agreement with Mr. Wade in the matter of the survey.

It is now necessary to refer to the materials which Mr. Wade possessed for the purpose of his guidance in the survey. To trace the 141st meridian east longitude it was sufficient to ascertain the point where that meridian struck the south coast and to proceed from that point in a due northerly direction. The position of this point could even at that date be obtained by two or three independent methods, all depending on astronomical observations. Of these, the method of lunar observations would be direct, *i. e.*, independent of the accuracy of the determination of the longitude of any other place. The two other methods in use at the time, *i. e.*, triangulation and chronometric observations, resulted only in determinations of the difference of longitude of the place of observation and of some known point with respect to which the triangulation and the chronometric observations were made. Observations of all three kinds had already been made, the most important being those of Mr. C. J. Tyers in 1839. In these observations Fort Macquarie, Sydney, was taken by Mr. Tyers as his point of departure, and he assumed its longitude to be $151^{\circ} 15' 14''$, which was the accepted value at the time. Other observations had been made by Capt. Stokes by chronometric observations. These two determinations were in the hands of Mr. Wade for his guidance, either at or shortly after the commencement of his labours, and must equally have been known to Mr. White, who was throughout in possession of complete knowledge of all the steps taken by Mr. Wade.

It will be necessary later to point out more in detail the impossibility of ascertaining with absolute certainty the position on the surface of the earth of an astronomical line such as a meridian. It is sufficient here to say that all these determinations differed slightly. One element which vitiated their accuracy was that the assumed longitude of Fort Macquarie was slightly incorrect, as was

shown many years afterwards by a series of lunar observations made in Sydney Observatory. But although this error was unknown at the time, it is quite clear that the Governors of both States were aware of the differences that existed in the determination of the starting point of the survey and realised that the existence of such differences must necessarily be anticipated. It is evident, therefore, that their action was consciously based on these considerations. In the letter of 30th December, 1846, already referred to, the Governor of New South Wales, writing to the Lieutenant-Governor of South Australia, expresses himself on this subject as follows:—

"With respect to the difference of a few seconds of longitude between Captain Stokes and Mr. Tyers as to the position of the Glenelg River, as stated by Captain Frome in his letter of the 22nd October, enclosed in Your Excellency's despatch of the 26th of that month, I apprehend that the best means in our power to ascertain the 141st meridian of east longitude, so as to meet the provisions of the Imperial Act, will be to direct the surveyors employed, to strike a mean between the calculations of Captain Stokes and Mr. Tyers."

Instructions to this effect were formally given to Mr. Wade by the Superintendent Surveyor for New South Wales in a letter of 28th January 1847, in the following terms:—

"With respect to the difference of a few seconds of longitude between Captain Stokes and Mr. Tyers as to the position of the Glenelg River, it is apprehended by His Excellency Sir C. Fitzroy that the best means to ascertain the 141st meridian of east longitude is to strike a mean between the calculations of Captain Stokes and Mr. Tyers; and this, therefore, so far as the New South Wales Government is concerned is the mode to be adopted in settling this point for the present survey. Should, however, any further question arise upon this subject I trust I may be able to communicate such additional instructions as may be necessary before you begin the work. But should the gentleman who is to join you from South Australia have been provided with similar directions this circumstance you will, of course, consider as the confirmation of the present instructions on this subject. I shall be glad to be informed when your party has reached its destination at the Glenelg, and when you are about to commence the survey, and any other particulars connected with it you may think requisite to communicate."

Although it was originally intended to take the mean of the determinations of Mr. Tyers and Captain Stokes, the results of Captain Stokes were, unfortunately, not sent to Mr. Wade in time, and he was compelled to adopt the determination of Mr. Tyers as his basis. Their

Lordships are unable to say whether this in any way increased the error of the actual determination, but it is quite evident that the action of Mr. Wade was communicated to and approved of by the Governors of both States. For example, in his letter to the Colonial Secretary, Adelaide, Mr. White on the 15th April, 1847, says:—

"I do not consider myself entitled to offer an opinion; yet, in the absence of any positive information relative to the position of the 141st degree of east longitude as laid down by Captain Stokes, I concurred with Mr. Wade in deeming it advisable to assume the 141st meridian of Mr. Tyers, and commence marking the boundary without any further delay; and this has been accordingly done, which I trust may meet with the approbation of His Excellency the Lieutenant Governor."

On 20th October, 1847, the Colonial Secretary for New South Wales transmitted to the Colonial Secretary for South Australia the reports made by Mr. Wade upon the boundary line so far as he had surveyed it before being compelled to desist, *i.e.*, to the 36th degree of latitude. The letter concludes as follows:—

"In forwarding these documents, I am also directed to inform you that Sir Charles Augustus Fitzroy concurs with His Honour the Superintendent in opinion that the object of the survey appears to be sufficiently attained for all practical purposes at present, and to suggest for the consideration of the Lieutenant-Governor that, in accordance with the Superintendent's recommendation, 'the boundary lines surveyed by Mr. Wade from the coast to the 36th degree of latitude' should be adopted and proclaimed 'as the recognised boundary line' as far as it extends between the respective dependencies."

In the following December the Lieutenant-Governor of South Australia proclaimed the boundary so marked out. This proclamation is so important that it is necessary to cite it in full:—

"Proclamation.

"By His Excellency Frederick Holt Robe, Esq., Lieutenant-Colonel in the Army, Lieutenant-Governor of Her Majesty's Province of South Australia and Vice-Admiral of the same."

"Whereas by an Act of the Imperial Parliament, passed in the fourth and fifth years of the reign of His late Majesty King William the Fourth, intituled, 'An Act to empower His Majesty to erect South Australia into a British Province or Provinces and to provide for the colonization and Government thereof.' His Majesty was empowered, with the advice of his Privy Council, to erect and establish within that part of Australia which lies between the meridians of 132nd and 141st degrees of east longitude, and between the Southern Ocean

and the 26th degree of south latitude, together with the Islands adjacent thereto, and the bays and gulfs thereof, one or more provinces, and to fix the respective boundaries of such provinces.

"And whereas His said late Majesty, on or about the nineteenth day of February, One thousand eight hundred and thirty-six, by Letters Patent under the great seal of Great Britain, with the advice of his Privy Council, and in pursuance of the powers in that behalf vested in his said Majesty by the said recited Act of Parliament, did erect and establish one province, to be called the 'Province of South Australia,' and did thereby fix the boundaries of the same province in manner following (that is to say):—On the north, the 26th degree of south latitude; on the south, the Southern Ocean; on the west, the 132nd degree of east longitude; and on the east, the 141st degree of east longitude; including therein all and every the bays and gulfs thereof, together with the Island called Kangaroo Island, or any part of the mainland of the said Province.

"And whereas from the progress of settlement on the eastern frontier of the said Province, and on the borders of the territory of New South Wales, it has become necessary to mark out and ascertain the 141st degree of east longitude, so fixed as the boundary of South Australia on the east as aforesaid; and for this purpose, by an arrangement previously entered into, the Government of New South Wales has, with the consent and concurrence of the Government of South Australia, caused the position of the 141st meridian of longitude, east from Greenwich, to be correctly ascertained at a spot on the sea coast near the mouth of the River Glenelg; and, therefrom, the said meridian to be surveyed northward as far as the 36th parallel of south latitude, by Henry Wade, Esquire, surveyor, and to be marked upon the ground by a double row of blazing upon the adjacent trees, and by mounds of earth at intervals of one mile where no trees exist.

"And whereas it is expedient that the said survey should be authoritatively adopted and made known.

"Now therefore, by virtue and in pursuance of the power and authority to me confided, I, the Lieutenant-Governor aforesaid, in name and on behalf of Her Most Gracious Majesty, do hereby notify, and proclaim, that the line so marked as aforesaid, and particularly described in the schedule hereto annexed, and delineated on the public maps deposited at the Survey Office, at Adelaide, as the meridian of the 141st degree of east longitude, is and shall be deemed and construed to be the eastern boundary of the Province of South Australia, to all intents and purposes; and all and singular Her Majesty's Officers, Ministers, and subjects in the said Province, and all others whom it may concern, are required to take due notice hereof accordingly.

"Given under my hand and the public seal of the said Province, at Adelaide, this eleventh day of December, One thousand eight hundred

and forty-seven, in the eleventh year of Her Majesty's reign."

"By His Excellency's Command,

"A. M. MUNDY,
Colonial Secretary."

In the schedule there was a clerical error whereby "one quarter of a mile east" appeared instead of "one and a quarter mile west." Their Lordships attach no importance to this, because it is evident that the rest of the schedule would show that the error was a clerical one and would enable it to be corrected. For instance, it gives the physical marks by which the boundary was marked out, commencing with the statement: "At about half a mile due north from the starting point a pyramid of stones is erected with a post in the centre marking the line of boundary." This would at once enable the erroneous description of the point from which the boundary line started on the coast to be recognised as a misdescription and corrected. But on learning of the existence of this clerical error within two or three days after the proclamation, the Governor of South Australia *ex abundanti cautela* issued a proclamation correcting the error, a precaution which, though in their Lordships' opinion unnecessary, was very proper under the circumstances. Both these proclamations were forwarded to the Governor of New South Wales, and on the 2nd March, 1849, the said boundary was proclaimed by the Governor of New South Wales in the following proclamation:—

"Proclamation.

"By His Excellency Sir Charles Augustus FitzRoy, Knight Companion of the Royal Hanoverian Guelphic Order, Captain-General and Governor-in-Chief of the Territory of New South Wales, etc.

"Whereas by Letters Patent, under the Great Seal of Great Britain, bearing date the twentieth day of February, in the ninth year of the reign of Her Majesty Queen Victoria, I, Sir Charles Augustus FitzRoy, am constituted and appointed Captain-General and Governor-in-Chief in and over the territory of New South Wales and its Dependencies, within the limits therein described, save and except that part of the said territory called and known by the name of the Province of South Australia; and whereas the eastern boundary line of the said Province, which separates it from this Colony, was by Letters Patent, bearing date the nineteenth day of February, One thousand eight hundred and thirty-six, issued by His late Majesty, King William the Fourth, fixed at the one hundred and forty-first degree of east longitude, reckon-

ing from the meridian of Greenwich; and whereas it having become necessary to mark out and ascertain the said one hundred and forty-first degree of east longitude between the said Territory of New South Wales and the said Province of South Australia, an arrangement was entered into with the Government of South Australia for that purpose, in consequence of which the position of the said one hundred and forty-first degree of east longitude has been correctly ascertained at a spot on the sea coast near the mouth of the River Glenelg, and therefrom northward as far as the thirty-sixth parallel of south latitude; and whereas it is expedient that the said boundary line, so marked, and surveyed, should be made known: Now, therefore, I, Sir Charles Augustus FitzRoy, as such Governor as aforesaid, do hereby notify and proclaim the lines so marked and surveyed, and particularly described in the schedule hereto annexed, and delineated on the public maps in the survey office in Sydney and Melbourne respectively, shall be deemed and construed to be the boundary line between the said Territory of New South Wales and the Province of South Australia respectively as far as the same extends.

"Given under my Hand and Seal, at Government House, Sydney, this twenty-eighth day of February, in the year of Our Lord one thousand eight hundred and forty-nine, and in the twelfth year of Her Majesty's reign.

"CHAS. A. FITZROY."

It is common ground that the schedules, though couched in slightly different language, are for all practical purposes identical.

Information of the establishment of a boundary line between the Colonies of New South Wales and South Australia, together with a copy of the Proclamation of that line by the Lieutenant-Governor of South Australia above referred to, was sent by the Governor of New South Wales to Her Majesty's Secretary of State for the Colonies, who acknowledged it by a letter of 17th May, 1848, in the following terms:—

"Downing Street,
17th May, 1848.

"Sir,

"I HAVE to acknowledge the receipt of your despatch, No. 7, of the 8th January last, announcing that the establishment of a boundary line between the Colonies of New South Wales and South Australia, and enclosing the copy of a Proclamation of the Lieutenant-Governor of that Colony upon the subject.

"In reply, I have to signify to you my approval of the care with which this work appears to have been accomplished.

"(Signed) GREY."

This was followed up by another letter from Her Majesty's Secretary of State for the Colonies, dated June 30th, 1848, which reads as follows:—

"Downing Street,
31st June, 1848.

"Sir,

"WITH reference to my despatch of the 17th ultimo, No. 80, relative to the boundary which has been established between New South Wales and South Australia, I have now to acquaint you that in intimating to Sir Henry Young my approval of the manner in which this work has been performed, as reported in a despatch which has been received from his predecessor, I have informed him that I consider it very desirable that no time should be lost in carrying on the survey to the River Murray.

"(Signed) GREY."

The suggestion of the Colonial Secretary contained in this letter was followed by the Governors of the two States, and the continuation of the demarcation of the line was entrusted to Mr. White and completed by him up to the Murray River on 7th December, 1850. It is common ground that this was marked out on the basis of being a continuation of the portion of the boundary marked out by Mr. Wade, and that it was done at the joint desire of the Governors of the two Colonies. The arrangements were actually carried out under the management of the New South Wales Government, but this was by the express wish of the Lieutenant-Governor of South Australia.

To conclude the history of this completion of the survey their Lordships find that in February, 1850, the Governor of New South Wales makes a claim on the Colony of South Australia for the moiety of the expenses of Mr. White, amounting to 419*l.* 4*s.* 7*d.* This sum (with a slight increase in respect of a premium which made it amount to 425*l.* 10*s.* 4*d.*) was reported to Earl Grey, who was then Her Majesty's Secretary for the Colonies, and he passed it on to the Lords Commissioners to the Treasury in the following letter dated the 17th October, 1850:—

"Sir,

"I AM directed by Earl Grey to transmit to you, for the consideration of the Lords Commissioners of the Treasury, the enclosed copy of a despatch from the Governor of South Australia, reporting the expenditure of the sum of 425*l.* 10*s.* 4*d.* in liquidating the debt due to the Government of New South Wales, on account of one-half of the charge of surveying the boundary line between the two Colonies. That service, which was necessary in itself had already been sanctioned, so far as the undertaking was concerned, and Lord Grey proposes, with their Lordships' concurrence, to sanction the expenditure now reported.

"I am, &c."

To which, on the 22nd of November, 1850, he received the following reply:—

"SIR,

"IN reply to your letter of the 6th inst., respecting a joint expenditure incurred by the Government of South Australia and New South Wales in surveying the boundary line between those Colonies, I have it in command to acquaint you, for the information of Earl Grey, that the Lords Commissioners of Her Majesty's Treasury concur in the opinion expressed by his Lordship regarding the necessity for this service, and approve therefore, of the payment by the Government of South Australia of the sum of 425*l.* 10*s.* 4*d.* in liquidation of the debt due to the Government of New South Wales on account of one-half of the expense incurred for the survey in question.

"I am, &c.,

"C. E. TREVELYAN."

The expenses thus approved of on behalf of the Treasury and the Secretary of State for the Colony were accordingly discharged out of the revenues of South Australia. The correspondence which passed at the time between the parties interested shows that there was the same feeling as in the case of the earlier surveys that the work had been carried out with exemplary care and diligence.

From this time forward the boundary thus marked out from the coast to the Murray River was accepted and acted upon by both Colonies as the boundary between them. It would seem however, that in the early sixties the Government of South Australia began to suspect that the Wade and White boundary lay somewhat to the west of the meridian of 141° east longitude, or in other words had been fixed in a position unfavourable to that Colony in that it diminished its area. Early in 1865 the question of marking out the boundary line northward from the Murray River came forward, and it was proposed that this should be done by extending the Wade and White boundary line northwards. To this latter proposition South Australia declined to accede, and finally instructions were given on behalf of New South Wales to Mr. Smalley, the Government Astronomer, and by South Australia to Mr. Charles Todd, the Superintendent of Telegraphs, to determine this part of the boundary line. They completed their work by December 1868, as is evidenced by their report of that date. Their determination of the boundary line was entirely independent of the Wade and White line, and the point at which it starts northward from the Murray River is about two

miles nineteen chains east of the point where the Wade and White line strikes that river. At the date when the Smalley and Todd boundary was fixed it was possible to use the very exact method of time signalling by electric telegraphy, and there is no doubt that the later determination of the point where the 141st meridian strikes the Murray River is much more accurate than the earlier one. No one can, however, predicate even of it that it is exactly correct. It is important to notice that the acceptance of this line was, as before, treated as a matter of agreement between the two Colonies, as is evidenced by the concluding paragraph of the report above mentioned, which reads as follows:—

"And we hereby agree on behalf of our respective Governments to accept the line hereinbefore described as the common boundary of the two Colonies."

It is on this combined action of the two Colonies that the whole of the boundary between New South Wales and Victoria on the one hand and South Australia on the other as marked out on the ground has always rested.

There remains little further in the history of the question that is relevant to the decision of the matters in issue. In the year 1850 the large and important district of New South Wales as then constituted, known as Port Phillip was erected into the independent Colony of Victoria. The River Murray forms the northern boundary of this Colony, and therefore Victoria alone is directly interested in the question of the validity of the Wade and White boundary. The present Colony of New South Wales has no interest in it. Acts have since been passed as to the formation of electoral districts in Victoria and as to the jurisdiction of public officers and magistrates. In all this legislation, as well as in the civil and criminal administration in the frontier lands, the existence of a boundary line has been recognised, and that boundary line has always been in practice the Wade and White line. But since the actual inaccuracy in the position of the Wade and White line has been a matter of general knowledge South Australia has again and again tried to induce Victoria to consent to a redetermination of the boundary. Such an attempt commenced in 1869, and at one time appeared likely to succeed, but in the year 1876 the Government of Victoria finally

refused its consent and the matter fell through, and a like fate has attended subsequent attempts of the same kind on the part of South Australia. Their Lordships, however, are of opinion that entering upon such negotiations does not imply any abandonment on its part of its contention that the original settlement is binding.

In the year 1861 the Queensland Government Act, 24 & 25 Victoria, c. 44 was passed, which contained in Clause 5 a provision relating to all the Australian Colonies. This clause reads as follows :—

“Whereas the Boundaries of certain of Her Majesty's Colonies on the Continent of Australia may be found to have been imperfectly or inconveniently defined and it may be expedient, from time to time, to determine or alter such boundaries: Be it therefore enacted as follows :—

“It shall be lawful from time to time for the Governors of any contiguous colonies on the said continent, and with the advice of their respective Executive Councils by any Instrument under their joint Hands and Seals, to determine or alter the common Boundary of such Colonies; and the Boundary described in any such Instrument shall be deemed to be, within the Limits there laid down, the true Boundary of the Colonies, so soon as Her Majesty's approval of such Instrument shall have been proclaimed in either of such Colonies by the Governor thereof.”

It was therefore competent to the Colonies of Victoria and South Australia after the passing of this Act to readjust their common boundary by observing the formalities prescribed by the Act and without any appeal to Imperial legislation, but their Lordships are of opinion that (excepting as explaining the later negotiations above-mentioned) this Act has no relevance to any of the matters in issue in this Appeal, because on the one hand it is common ground that nothing has been done which would constitute a compliance with the conditions of the section, and on the other hand their Lordships have no doubt that the passing of this Act, did not take away from the Governments of the Colonies interested any rights or powers which they previously possessed. Its sole effect was to enable them, if they complied with its provisions, authoritatively to fix a common boundary line whether or no it agreed with that previously fixed by Imperial legislation or by Orders in Council. This was an additional power given by the Statute

which was not previously possessed by those Colonies.

Having thus recapitulated the relevant material it remains to consider the argument based thereon by the Appellants. It is clearly and forcibly expressed in the dissenting judgment of Higgins, J., in the High Court. It may be stated thus :—The Act of 1834 (4 & 5 William IV., c. 95) under which South Australia was created a Colony, enacted that His Majesty, with the advice of His Privy Council, might erect within a defined part of Australia (which includes the present Colony of South Australia) one or more provinces and fix the respective boundaries of such provinces, and that the inhabitants of such provinces should be free from the laws, orders, statutes, and constitutions of other parts of Australia, but should be subject to and bound to obey such as were from time to time made for such province or provinces. They further say that by the Order in Council of February 19th, 1836, the Crown, acting under the powers given by that Act, created the Colony of South Australia and fixed its eastern boundary at the meridian of 141° east longitude; that the boundary so fixed has the same legal status as if it had been fixed in and by the Imperial Statute, and that therefore nothing less than an Imperial Statute can alter it. Finally, they say that no Imperial Act has been passed which either specifically alters it or gives powers of alteration to any other individual or legislature which have been exercised in that behalf, and that, therefore the boundary between the two States remains as it was fixed by the Order in Council.

Counsel for the Appellants did not in any wise shrink from putting forward in the plainest terms the consequences which he contended must follow from the above legal argument. He admitted that neither at the date of the Order in Council nor at any subsequent time was it possible to fix with accuracy a line on the surface of the earth representing the meridian: he also admitted that the degree of accuracy with which this could be done had increased with the progress of knowledge and would probably increase still further in the future, and that therefore the boundary, however carefully fixed, could never be said to be the legal boundary or to warrant

the claim of either Colony to exercise jurisdiction up to it in view of the possibility that a redetermination of greater accuracy might shift its position.

With much, if not all, the legal argument for the appellants stated as above their Lordships find themselves in agreement. They are of opinion that, so far as fixing the boundary of South Australia is concerned, the Letters Patent of February 19th, 1836, have the authority and force of an Imperial Statute, and that no subsequent legislation has modified them so far as is relevant to the present Appeal. The interpretation and validity of the provisions of these Letters Patent stand to-day just as they stood at the time when they were issued. But their Lordships find themselves unable to accept the interpretation of those provisions which is contended for by the appellants.

In order to make clear the decision of their Lordships on this point and the reasons upon which it is based it will be necessary shortly to consider what is implied in taking an astronomical line such as a meridian as the boundary of a State. The position and course of such a line on the actual surface of the earth can only be obtained by means of elaborate astronomical observations. At the date of the Letters Patent, the possible observations for this purpose were of three kinds. The first was by lunar observations, which would give by means of a comparison of the position of the moon as observed locally with the computed position of the moon as recorded in the Nautical Almanack a means of ascertaining the difference between local time and Greenwich time and, therefore, of determining the longitude of the place. This method, though probably the most accurate then available, was liable to errors of observation, and further to errors in the computation of the moon's future position contained in the Nautical Almanack, which, especially at so early a date, were not inconsiderable. Another method was by chronometrical observations. A considerable number of chronometers of known rate are compared with the local time at a place whose longitude is known, and then brought to some place of observation near to the position of the meridian and compared with the local time there, and in this way the difference of the local time at the place of

observation and at the place selected as a basis of comparison is ascertained and the difference of their longitudes arrived at. This method was liable to a double error. The longitude of the starting point might not have been correctly ascertained and any error in such longitude must necessarily appear in the final result. But there was the further source of error arising from the difficulty of making chronometrical observations with accuracy. The third method was by direct triangulation, that is to say, by making a complete survey starting from some point of departure whose longitude was supposed to be known, and reaching to and including the place of observation near the desired meridian. This was liable to error due to inaccuracy in the determination of the longitude as a point of departure in exactly the same way and to the same extent as the preceding method. But in addition it had its own special sources of error. Although no doubt a complete and careful geodetic survey conducted with all the modern precautions against error is a very satisfactory way of determining the position of any point in a country, the cumulative effect of errors of observation in such a triangulation as was practicably possible in a sparsely occupied country at that date would necessarily be considerable.

The critical fact for the decision of the question in this case is that although care on the part of the observers and excellence in the instruments used by them are able to reduce the effect of these sources of error to an amount which appears to be negligible in angular measurement, the practical consequences of such an error on the face of a globe of the size of the earth are by no means capable of being neglected. A degree, which is the ninetieth part of a right angle, seems to be a very small angle, and when it is borne in mind that a second is the three thousand six hundredth part of that small angle it would seem to be meticulous particularity to trouble about a few seconds in the determination of an angle. But in the latitude in question the distance corresponding to one second of arc (which is passed over by the sun in the fifteenth part of a second of time) is about 80 feet, so that the inevitable inaccuracy of these deter-

minations represents considerable distances on the surface of the earth. The expert astronomical witnesses that were called in this case estimated the probable error of such a determination if made in or about the year 1847 at amounts varying from one mile to three miles, so that it may safely be assumed that at the date of the Letters Patent it was impracticable to determine the position of the meridian without a probable error of, say, two miles.

The fact that no astronomical determination can be accurate is not a reflection on the position of astronomy among the sciences. Throughout the whole world of observations the inevitable presence of inaccuracies is recognised, and the dominant idea is to determine the probable error of each set of observations, that is to say, the margin of inaccuracy which must be allowed to it and within which it cannot be trusted. As the means and instruments of observation improve this probable error grows smaller, but it can never disappear. A striking example of improved methods is given in the present case. The Letters Patent date before the introduction of electric telegraphy and Wade and White made their determination before it was available for their purpose. The consequence is that they had to base their survey on results obtained from the comparison of chronometers, whereas far more accurate determinations of time can be made by electric signals which are instantaneous in transmission. But even with the use of such improved methods there remains a probable error, and it would appear that the determination of the boundary of New South Wales and South Australia north of the Murray River, which was made with the aid of telegraphic signals, is probably a hundred yards to the east of the meridian which it purports to mark out.

Bearing these considerations in mind, let us consider what is the meaning of fixing the boundaries of two provinces by an astronomical line such as the meridian. This boundary is to separate not only civil but criminal jurisdiction. The inhabitants of the country on the one side are to be subject to one set of laws and authorities, and those that inhabit the country on the other side of the line are to be subject to another. It is essen-

tial that the given boundary should be such as fixes the rights and duties of the people and their rulers, and this can only be done by its fixing a boundary on the surface of the earth which divides the two. To hold in favour of the appellants would be to say that the provisions of the Letters Patent contemplated the continued existence of a No Man's Land of finite breadth over which the authorities of neither Colony could legitimately assert authority and which, although no doubt its breadth might be reduced as the advance of science diminished the probable error of the observations, could never be wholly extinguished.

It is impossible, in their Lordships' opinion, to hold that this is the true and complete interpretation of the provisions of the Letters Patent taken in connection with the statute under which they were issued, which is expressly directed to the defining of a province or provinces the inhabitants of which "shall be free and shall not be subject to or bound by any laws, orders, statutes or constitutions" of any other part of Australia, but shall be subject to and bound by their own only. To define a boundary for such purposes it is necessary that the boundary line should be described or ascertainable on the actual surface of the earth. In the case of such a boundary as that defined by the Letters Patent it was necessary in order to accomplish this that there should be an executive Act so defining and representing the enacted boundary; and seeing that such an executive Act was and must have been known to be essential to render the provision in the Letters Patent a boundary such as was needful for the purposes of the Act, their Lordships have no doubt that on well-known principles of the interpretation of statutes the Letters Patent must be taken to have implied and authorised the delineation and determination of the effective boundary by such an executive Act.

Counsel for the appellants would have us take the view that it only contemplated laying out from time to time a provisional boundary differing from the legal boundary, which, though growing more and more accurate, would never possess the status of finality. But in so doing he entirely overlooked the difficulties of the case. It is impossible for authorities to settle provisionally between themselves

what area of jurisdiction they will take. The rights and liberties of the inhabitants of the country are expressly settled by the statute, and such a suggestion would imply that the legislature contemplated that the authorities should without any warrant suspend as they might find most convenient its express provisions. But furthermore can it be supposed that it was the intention of the legislature and of the King in Council that the authorities should expose themselves *ex necessitate* to actions by persons over whom they have exercised jurisdiction prior to some redetermination of the boundary line in places where it has been ascertained that their jurisdiction did not legally extend? The only alternative is that they should on both sides abstain from exercising jurisdiction over any part of the doubtful territory, and this would be to permit the creation of an Alsatia in which criminals would enjoy full protection. And we are asked to accept an interpretation which entails all these grave difficulties in lieu of holding that the legislation carries with it an implied power to the executive to do such acts as are and are known to be necessary to translate the directions of the Letters Patent into an actual boundary in the practical sense of the word.

Their Lordships therefore hold that on the true construction of the Letters Patent it was contemplated that the boundary line of the 141st meridian of east longitude should be ascertained and represented on the surface of the earth so as to form a boundary line dividing the two Colonies, and that it therefore implicitly gave to the executives of the two Colonies power to do such Acts as were necessary for permanently fixing such boundary. This being so, the only question is whether the acts of the executive fixing the Wade and White line as the boundary were acts such as were so contemplated and empowered. As to this their Lordships feel no difficulty. The facts set out above show that the two Governments made with all care a sincere effort to represent as closely as was possible the theoretical boundary assigned by the Letters Patent by a practical line of demarcation on the earth's surface. There is no trace of any intention to depart from the boundary assigned, but only to reproduce it, and as in its nature, it was

to have the solemn status of a boundary of jurisdiction, their Lordships have no doubt that it was intended by the two executives to be fixed finally as the statutable boundary and that in point of law it was so fixed. Nothing could be more striking than the open and formal way in which the Wade line to the 23rd degree of south latitude was proclaimed and acknowledged by both Colonies with the sanction of the Secretary of State for the Colonies, and though the northern part of the boundary which was laid out by Mr. White did not receive such a formal and public recognition inasmuch as it was not proclaimed, yet it was ordered, carried out, and accepted in precisely the same way as the earlier survey, and there is not in their Lordships' opinion any difference between the two portions of the boundary in respect of their authority and finality.

It is unnecessary therefore for their Lordships to consider that portion of the respondents' case which rests upon the length of time during which the boundary line has been in fact accepted in practice by both Colonies. Similarly they do not think it necessary to deal with the somewhat refined considerations arising from the fact that the Victorian electoral districts have been statutably mapped out on the basis of this boundary line in the statutes creating them, nor to consider whether the Royal prerogative to fix boundaries can be treated as being in abeyance so far as these Colonies are concerned. They therefore express no opinion on these points.

Their Lordships will therefore humbly advise His Majesty that this Appeal should be dismissed.

T. S. N.

Appeal dismissed.

A. I. R. 1914 Privy Council.

(FROM CANADA).

20th October, 1914.

LORDS DUNEDIN AND PARMOOR AND SIR CHARLES FITZPATRICK.

The Windsor, Essex, and Lake Shore Rapid Railway Company—Appellants
v.

A. J. Nelles and another—Respondents.

Privy Council Appeal No. 86 of 1913.

Specific performance—Suit in Ontario for specific performance and in the alternative for damages—This is an equity proceeding—Judg-

ment determining liability but leaving the question of damages for further enquiry—An appeal lies from such judgment as a matter of right from the Court of appeal, to the Supreme Court of Canada—The judgment cannot be attacked in an appeal from the judgment on damages made to the Supreme Court when no appeal had been filed in time from the former judgment and when special leave to appeal, under S 71 of the Supreme Court Act from the same judgment had been refused—Supreme Court Act (Canada), Ss. 38 (c) and 71 referred—Practice.

The respondent brought a suit for specific performance of a contract and in the alternative for damages. The Court of first instance decreed specific performance and in default, damages to be ascertained by the Master. This decree was confirmed on appeal by the Court of appeal. The appellants stopped there and did not carry the matter up by further appeal and went before the Master on the question of damages. The decree on the question of damages was carried up to the Supreme Court of Canada where the appellants sought to review the decree granting specific performance also. The Supreme Court however refused to interfere with that decree. Then the appellants made an application to the Chief Justice of Ontario for leave to appeal against that decree, which was refused, which refusal was confirmed by the Court of appeal. Then in the argument before the Supreme Court, in the appeal in the matter of damages the appellants claimed as of right to open up the original decree granting specific performance on the ground that this was a common law action (in which judgment fixing liability and amount of damages would be given simultaneously). The Supreme Court on 10th December, 1912 rejected this contention. On appeal to the P. C.

Held: (i) This proceeding was an equity proceeding. Specific performance was the primary claim and the alternative claim for damages in default of specific performance is a well known equity remedy and in particular was one that was in use to be given by the old Court of Chancery in Ontario as is evident by Section 40 of the Chancery Act of Ontario. That being so an appeal lay as a matter of right to the Supreme Court of Canada from the Court of appeal in virtue of Section 38 (c) of the Supreme Court Act. That appeal not having been taken and the leave to appeal prayed for under Section 71 having been refused, leave should not be given to appeal now. [P. 282, C. 1 & 2.]

(ii) If we assume this to be a common law action then the view in Canada seems to have prevailed that so long as the whole matter is not effectively dealt with the first judgment is merely interlocutory and that therefore no appeal as of right lies against the judgment fixing liability, damages being yet undetermined. The appeal to the Supreme Court by the appellant was only on the question of damages. In that appeal, all that the Supreme Court could do was to vary amount of damages if it thought fit. The Court of appeal in the appeal on damages could not interfere with the original decree. Hence, the Supreme Court also could not interfere with the original decree. [P. 282, C. 1.]

Lord Dunedin:—The plaintiffs and respondents in this case were engineers and contractors, and acted as promoters in making preliminary arrangements and negotiating franchises through the different municipalities for the defendant company, now appellants.

The defendant company was incorporated by an Act of the Province of Ontario of 1901. The plaintiffs entered into an agreement with certain persons who formed the major part of the provisional directors of the company, by which they stipulated for a payment of \$ 72,000 of the paid up capital stock of the company and \$ 45,000 of the first mortgage bonds of the company to be paid to them by the company in respect of their services as promoters. The line was eventually constructed under arrangements which need not be here detailed.

The present action was brought on the 25th September, 1906, by the plaintiffs against the company and against the individuals who had been parties to the above-mentioned agreement. In the writ and statement of claim they claimed specific performance of the terms of agreement or damages for breach thereof, with various ancillary claims which need not be detailed. The action was tried before Mr. Justice Clute, and judgment was given against all the defendants on 16th March, 1907, decreeing specific performance, and on failure to make good that decree to go before the Master on a reference as to damages.

Appeal was taken by all the defendants to the Court of Appeal for Ontario, when, on 21st April, 1908, the judgment of the Trial Judge upon the merits (the defendants having on various grounds denied liability altogether) was affirmed. The action was, however, dismissed as against the individual defendants, but specific performance was again decreed against the company, and, failing specific performance, a reference as to damages. Upon that judgment the defendants (the present appellants) took no step to bring it to further appeal, but went back to the Court below and appeared before the Master, before whom a long and expensive reference was conducted. On the 7th April, 1909, the Master made his report. That report was brought before the Chief Justice of the Common Pleas by appeal, and, on the 23rd January, 1911,

the Chief Justice varied the amount as brought out by the Master. On the 8th March, 1911, on a motion for further directions, the Chancellor of Ontario gave judgment against the company in accordance with the report as varied.

The company then appealed to the Court of Appeal for Ontario against the judgment of the Chief Justice varying the Master's report and the judgment of the Chancellor on further directions. On the 28th April, 1911, the Court of appeal unanimously dismissed both appeals with costs.

The appellants then appealed to the Supreme Court of Canada against the last judgment and sought in that appeal to review the original judgment of the Court of Appeal of the 21st April, 1908. The question of jurisdiction or competency was raised, and the Registrar of the Supreme Court affirmed the jurisdiction of the Supreme Court to hear an appeal from so much of the judgment of the 28th September, 1911, as had reference to the order of the Chancellor on further directions, but held that the Supreme Court had no jurisdiction to hear an appeal from the original judgment of the 21st April, 1908. This order of the Registrar was confirmed on appeal by the Supreme Court of Canada on the 23rd February, 1912.

On the 6th March, 1912, an application was made by the appellants to the Chief Justice of Ontario for special leave to appeal from the original judgment of the 21st April, 1908, but was refused. On the 18th June, 1912, a motion by way of appeal from this order was made to the Court of Appeal for Ontario, and a substantive motion was also made to extend time and for leave to appeal. Both motions were refused, and the reasons of refusal were given by Mr. Justice Maclaren in a judgment in which Moss, Chief Justice of Ontario, and Garrow and Magee, JJ., concurred, in the following words:—
“The Trial Court ordered specific performance and in default damages. On appeal to this Court the judgment was modified, but specific performance was decreed against the company on the 21st April, 1908. . . . In my opinion the company might have appealed as of right from the last-named judgment within the sixty days provided by Section 69 of the Supreme Court Act. . . . Section 38 (c) of the Supreme

Court Act gives an appeal to that Court from any judgment whether final or not of the highest Court of final resort . . . in any action, suit, cause, matter, or judicial proceeding in the nature of a suit or proceeding in equity. . . . Assuming that we still have the power under Section 71 of the Supreme Court Act to extend the time and allow the appeal, I am strongly of the opinion that it should not be done.”

On the argument of the appeal before the Supreme Court of Canada from the judgment on further directions which, as already mentioned, had been allowed by the judgment of that Court of the 23rd February, 1912, the appellants maintained that this was a common law action and that, if so, they were entitled as of right to open up the original judgment on the appeal from the judgment on further directions. On the 10th December, 1912, the Supreme Court of Canada dismissed the appeal, holding that they were not entitled under it to touch the original judgment of the 21st April, 1908.

When the appellants applied to this Board for special leave to appeal, the point was taken by the respondents that no appeal ought, in the circumstances above detailed, to be allowed against the original judgment of the 21st April, 1908. Their Lordships have perused the remarks of those of their Lordships who sat at the Board on the occasion of granting leave to appeal, and they are clearly of opinion that such leave was only granted *periculo petentis*, and that the point of whether leave upon a full knowledge of the circumstances should have been granted is still open.

The first matter to be considered is whether the Supreme Court were right in holding that under the judgment on further directions they were not entitled to go into the question of the merits which had been disposed of in the original judgment of the 21st April 1908. Assuming that this were a common law action, the difficulty might be said to arise in this way: The appellate jurisdiction of the Supreme Court is dealt with as regards final judgments by Section 36 of the Supreme Court Act. Now in the original common law procedure the judgment on liability and damages would always be given at one and the

same time. That is obviously the case in cases tried by a jury, and would also be so in cases tried by a Judge, and accordingly a judgment which fixed liability and assessed damages would inevitably be a final judgment. Since, however, the fusion of Courts of law and equity there has grown up a practice—convenient, no doubt, in cases tried before Judges without juries—to make a finding of liability and direct an inquiry into damages, a course of procedure which is really borrowed from the equity side. In such a case, is the judgment fixing the liability a final or is it an interlocutory judgment? The view in Canada seems to have prevailed that, so long as the whole matter is not effectively dealt with, the first judgment is merely interlocutory, and that therefore no appeal as of right lies against the judgment fixing liability, damages being yet undetermined, in a purely common law action. That being so, it seems to their Lordships that the judgment of the Supreme Court was necessarily right. The appeal from the directions had to do with the damages, and the damages alone. All that the Supreme Court could do was to pronounce the order which the Judge below should have pronounced if he had done it right. In other words, they might, if they thought right, have varied the amount of the damages; but the Judge below never could have touched the judgment on the merits of his own Court of Appeal; he, in pronouncing the order as to the damages, was really merely carrying out what the Court of Appeal had already determined as to the liability; and accordingly the Supreme Court could not pronounce an order which the Judge below himself could never have pronounced. This may be inconvenient, and as a matter of fact their Lordships notice that by a subsequent statute (Chapter 51 of 3 and 4 Geo. V., Section 1) an alteration in the law has been made which will allow a judgment of the class of which their Lordships have been speaking, which settles liability and leaves an inquiry as to damages to follow, to be treated as a final judgment. That, however, was not the law in Canada at the period to which these matters relate.

In their Lordships' view, however, this proceeding was not a common law

proceeding, but was an equity proceeding. Specific performance was the primary claim, and the alternative claim for damages in default of specific performance is a well-known equity remedy, and in particular was one that was in use to be given by the old Court of Chancery in Ontario, as is evident by Section 40 of the Chancery Act of Ontario. (Revised Statutes of Ontario, 1877, Chapter 40). That being so, their Lordships are of opinion that Mr. Justice MacLaren, was right in the passage already quoted, and that an appeal as of right against the judgment of the 21st April, 1908, lay under Section 33(c) of the Supreme Court Act. That appeal was not taken, and although their Lordships are willing to consider that an application under Section 71 was quite competent, that application was made and was refused by the unanimous judgment of the Court of Appeal of Ontario of the 18th June, 1912. Their Lordships have come to the conclusion that if these facts had been fully stated and understood as they now are, no leave to appeal would have been given in this case. In their Lordships' view it would be most unfortunate that where a matter could have been brought up in the ordinary course, and where the discretion of the Court has been exercised, of saying that indulgence as to extended time should not be given, the whole of the proceedings should be allowed to come to an end, a long lapse of time intervene, and then the whole matter be opened from the very beginning by an appeal to this Board.

In these circumstances their Lordships do not express any opinion upon the difficult and intricate questions which were argued before them as to the technical objections which existed against the agreement sued on being binding on the company, but they will humbly advise His Majesty to dismiss the appeal with costs.

T. S. N.

Appeal dismissed.

**** A. I. R. 1914 Privy Council.**

(FROM NEW SOUTH WALES).

4th August, 1914.LORDS MOULTON, SUMNER AND SIR
JOSHUA WILLIAMS.*The Pastoral Finance Association, Limited*—Appellant

v.

The Minister—Respondent.

Privy Council Appeal No. 110 of 1913.

**** (a) Land Acquisition—Compensation** should be the value of the land to the person dispossessed—This value may be prospective—But capitalised value of prospective profits should not be added but the prospect of profits being earned should be taken into account.

On being dispossessed of it, the owner is entitled to receive as compensation the value of the land to him whatever it may be. The question whether that value has as yet been developed by the actual erection of the buildings necessary to enable him to realise the special value it possesses is one of the circumstances which is material for guiding the jury to assess its value but it by no means prevents the land having this special value, nor does it interfere with the owner's right to have that special value duly assessed by the jury, as the amount of the compensation due. The owner would not be entitled to have the capitalised value of the savings and additional profits expected to be realised from the use of the land, added to the market value of the land in estimating his compensation. He would only be entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land.] [P. 284, C. 2 & 285, C. 1 & 2.]

(b) Practice—New plea—Objection to misdirection to jury by Trial Judge, taken by the respondent for first time in argument before Privy Council was disallowed as great injustice would otherwise be done to appellant—Practice, jury

There was a misdirection to the jury on a certain principle of assessment of compensation payable to a person whose land had been acquired by the Government.

Held, that in view of the fact that the whole trial was conducted by both sides on the basis of that erroneous principle, that no exception was taken to the ruling of the learned Judge in this respect at the trial, that the point was not raised on the appeal to the full Court or in the respondent's case on the appeal to their Lordships and that it was first taken in the argument of the respondent's Counsel at the hearing of the appeal before the Privy Council a grave injustice would be done to the appellant, if they were to allow the point to be raised at so late a moment and to permit the respondent to recommence the proceedings after they had thus proceeded to their latest stage and so no retrial should be ordered. [P. 285, C. 2.]

Lord Moulton :—The appellant, the Pastoral Finance Association, Limited,

is a company which has for many years carried on a large business in wool at Kirribilli Point, on the north side of Port Jackson, in New South Wales, and has during late years added thereto the business of freezing meat for export. The business of the Association has grown considerably in recent years, and in 1910, that business was so large that it decided to move into new premises, and for that purpose it purchased in March, 1910, a very suitable site, within the city boundary at Jones Bay, having a frontage on Darling Harbour.

Having acquired the land the Association procured plans and estimates for erecting thereon buildings adapted to the needs of the whole of its business, which it proposed forthwith to transfer from Kirribilli to the new site. But before actually commencing the erection of these buildings the Association learned that Government intended to resume the land. On ascertaining that this was actually the case it desisted from actual building operations. The notice to resume was not in fact given until 29th March, 1911, but some months earlier the Association had been informed by Government of their intention to resume the land. The Association duly served upon the respondent and upon the Crown solicitor the usual statutory notice setting forth its claim. The Government refused to accept the claim as thus stated by the Association, and as the amount of compensation was therefore not agreed between the parties, the present action for compensation was brought by the appellant to establish the amount to which it was entitled in respect of the land resumed. The amount claimed in the declaration is 24,235/-. By his plea the defendant alleged that he had caused a valuation to be made of the estate and interest of the appellant in the lands, and that it amounted to 10,000/-. No tender or offer of this sum seems to have been made, and in his plea he alleges that the sum exceeds the amount of compensation to which the appellant is entitled in respect of the premises, so that it is probable that no such tender was made.

The case went to trial in the ordinary way before Ferguson, J. and a jury. Each side called evidence purporting to show the effect which the transfer of the business to the new site would have had on

the prospective profits of the business, and that evidence referred more especially to the savings which would in future have been made in the new premises by reason of the alleged suitability of the site for carrying on a frozen meat business. It may fairly be said to be common ground that the site had special suitability for the use to which the appellant proposed to put it, the only question being the amount of the savings and increased profits that would result therefrom. The Judge went into the evidence with great care in his charge to the jury, and directed them with great fulness as to the law. When the jury retired to consider their verdict Counsel for the respondent made an application to him to give certain rulings. This led him to recall the jury and add to his previous charge certain further directions on the lines of those he had thus been requested to give. The jury again retired and finally, after being absent some four hours, they returned with a verdict for the appellant for 23,550*l.*, and of their own accord they added by way of rider that they valued the land at 9,950*l.* Upon this verdict the learned Judge entered judgment for the appellant for 23,550*l.*, as he was undoubtedly bound to do.

On 27th December, 1912, the respondent gave notice of motion before the full Court asking that the aforesaid verdict should be set aside and a new trial granted, or that the amount of the verdict should be reduced on certain grounds. The motion was heard on 20th March, 1913, and the Court by a majority reduced the verdict to 9,950*l.* The substantial ground on which the majority of the Court based their decision was that the appellant was not entitled to anything beyond the market value of the land by reason of the fact that it had not as yet erected any buildings thereon, and therefore that the verdict should have been for the mere value of the land which they took to have been fixed by the jury at the above sum.

Their Lordships have no hesitation in deciding that the principle underlying this decision is erroneous. In fact Counsel for the respondent did not attempt to support it. The appellant was clearly entitled to receive compensation based on the value of the land to it. This proposition could not be contested. The land

was its property and, on being dispossessed of it, the appellant was entitled to receive as compensation the value of the land to it whatever that might be. The question whether that value had as yet been developed by the actual erection of the buildings necessary to enable the appellant to realise the special value it thus possessed was no doubt one of the circumstances which was material for guiding the jury to assess its value in the appellant's hands, but it by no means prevented the land having this special value, nor did it interfere with the appellant's right to have that special value duly assessed by the jury, as the amount of the compensation due. Their Lordships have great difficulty in arriving at the meaning of the rider which the jury affixed to their verdict to the effect that they estimated the land at 9,950*l.*, but they are satisfied that it was not in law the verdict of the jury, and that therefore no legal effect can be given to it. It was merely a voluntary statement made by them as to the figure at which they had arrived in the course of their deliberations with regard to some matter, the nature of which cannot be ascertained from the language used by them. It was probably intended to refer to the full market value of the land but whether that was or was not its meaning is a question of mere guess.

Their Lordships have therefore felt no difficulty in arriving at the conclusion that the decision appealed against must be set aside. But the argument of Counsel for the respondent raised difficulties with regard to the judgment at the trial which were of a most serious character. It would appear that the evidence of prospective savings and additional profits given at the trial was put forward in support of a claim that the capitalised value of the increase in the profits of the business due to them should be added to the market value of the land in arriving at the compensation. This view of the law seems to have been accepted by all parties. The evidence on behalf of the respondent related only to the quantum of this addition and the Judge in his summing up said to the Jury:—

"Then you will consider what capital amount fairly represents those savings and those profits and you will add that to the amount that you consider fairly represents the market value of the land independently of these special questions."

Their Lordships are of opinion that this direction is seriously at fault. That which the plaintiff was entitled to receive was compensation not for the business profits or savings which he expected to make from the use of the land, but for the value of the land to him. No doubt the suitability of the land for the purpose of his special business affected the value of the land to him, and the prospective savings and additional profits which it could be shown would probably attend the use of the land in his business furnished material for estimating what was the real value of the land to him. But that is a very different thing from saying that he was entitled to have the capitalised value of these savings and additional profits added to the market value of the land in estimating his compensation. He was only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that he was entitled to that which a prudent man in his position would have been willing to give for the land sooner than fail to obtain it. Now it is evident that no man would pay for land in addition to its market value the capitalised value of the savings and additional profits which he would hope to make by the use of it. He would no doubt reckon out these savings and additional profits as indicating the elements of value of the land to him, and they would guide him in arriving at the price which he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the capitalised savings and additional profits to the market value.

If, therefore, the case had been conducted on behalf of the respondent on different lines at the hearing, or if objection had been taken on the Appeal to the charge of the learned Judge at the trial on the above grounds their Lordships would have felt constrained to set aside the verdict and direct a new trial. But in view of the fact that the whole trial was conducted by both sides on the basis that the correct estimate of the compensation was the addition of the properly capitalised savings and additional profits to the market value of the land, that no exception was taken to the ruling of the learn-

ed Judge in this respect at the trial, that the point was not raised on the Appeal to the full Court or in the respondent's case on the Appeal to their Lordships and that it was first taken in the argument of the respondent's Counsel at the hearing of this Appeal, their Lordships feel that they would be doing a grave injustice to the appellant if they were to allow the point to be raised at so late a moment and to permit the respondent to recommence the proceedings after they have thus proceeded to their latest stage. Their Lordships therefore will humbly advise His Majesty that the Appeal be allowed and that the order of the full Court be set aside with costs and the judgment of the Judge at the trial restored. The respondent will pay the costs of this Appeal.

S. A. R.

Appeal allowed.

A. I. R. 1914 Privy Council.

(FROM JAMAICA.)

29th July, 1914.

LORDS DUNEDIN, ATKINSON, SUMNER
AND SIR JOSHUA WILLIAMS.

Edward Augustus Glen Campbell—Appellant

v.

The West India Electric Company, Limited—Respondents.

Privy Council Appeal No. 119 of 1913.

Evidence Act, Ss 93-98—Construction of license under which tramways were worked in Kingston, Jamaica—Meaning of the word "Journey" in the charging words—No ambiguity—Pure question of construction—Evidence and proceedings before the Privy Council (Jamaica) at the time of granting the license are not admissible—"Journey" meant one journey in one car—Deed construction.

The charging words of a license under which the respondents worked electric tramways in Kingston, Jamaica ran as follows:—

"The licensees may.....take for every passenger travelling upon any of the cars...for one journey between any two points in one district, 2d." The question was as to the meaning of the word "journey" in the above.

At the trial a transcript of the shorthand notes of the evidence and proceedings before the Privy Council (Jamaica) antecedent to the granting of the license, was tendered in evidence.

Held, that the evidence was inadmissible. There was no ambiguity about the word "journey" though the construction of the sentence in which it occurred was very arguable. There was no evidence or contention that the word had any technical or acquired meaning different from that

which it bore in common speech. The question was how it should be understood in connection with the other words among which it stood. This was purely a matter of construction. What was in the minds of the parties was not *ad rem*. What was put into the license, which the Governor granted and the Company accepted, had taken its place.

[P. 287, C. 1, 2.]

Held, further that the word "journey" meant one journey of the passenger in one car. If he transferred himself to another car or a third, he passed beyond the expressed limits of the right which he obtained for his 2d. [P. 288, C. 1.]

Lord Sumner :—This action was brought to recover six pence paid under protest. The respondents work electric tramways in and near the city of Kingston, Jamaica, and there has long been a dispute about the fares to be charged. To bring matters to a head and raise a test case the plaintiff, now appellant, made three separate journeys on 3rd June, 1912, by the respondents' tramcars, on each of which, besides twopence admittedly payable and duly paid, a further fare of twopence was charged and paid by him under protest to raise the question of the lawfulness of the charge.

The tramways are worked under powers conferred by the "Kingston and St. Andrew Tramways License, 1897." They form one undertaking, and are worked as one concern. Clause 9 provided that "the routes to be followed . . . and the nature of the lines to be constructed are severally defined and described in Schedule A hereto," and that schedule defined and described seven "tramways." They varied much in length, from upwards of six miles to as little as 1,050 feet. Two were abandoned, including the last named, and two others have been added under particular powers not now material. Though they were thus described and authorised as separate "tramways," they are all physically connected together and form one network of running rails, with ramifications. For the purpose of charging fares and tolls the area for which the license was granted was divided into three districts by the terms of Section 26 of the license. One district contains the city of Kingston and is the main part of the system. Here most of the tramlines are so linked together that cars can start in one direction and return to the starting point in another without retracing their course, but two of the lines run out to terminal points, from which cars have to return

over the same track for a considerable distance. In District No. 2 there is one line only; it branches off from the city system, and runs to a point which is the end of that line. District No. 3 contains two such terminal points, from which lines converge towards the city, and, having met and joined, then run as a united line till they join the city system at the boundary between District No. 3 and District No. 1.

For their own purposes the defendants plan their services of cars in routes or lines. These "lines" do not coincide with the "tramways" named in Schedule A. Sometimes the route is a through one, and cars run out of one district into another. Sometimes the cars run wholly within one district. Often they run to or past a junction, at which one line of rails connects with another, and the bifurcation is treated as the beginning and the end of the journey of a service of cars connecting with the service on the first line. Sometimes, though the line of rails runs on continuously without junction or division, a point upon it is selected as the terminus of one arranged route and the commencement of another, and here sometimes the same car may run past that point, ending one journey at it and forthwith beginning another, sometimes two cars are employed.

The plaintiff's claim was, that so long as a passenger made a journey of his own laying out and for his own purposes within the limits of one district, payment of one fare of twopence entitled him to travel in the cars over the whole of it, in any combination of cars he chose to devise, and whether he changed from one car to another, or was carried in the same car past the point at which one route was arranged to end and another to begin. The company claimed a fresh fare for every change, either from car to car or from route to route in the same car within any one district.

The plaintiff laid out his journeys on the day in question, so as to test the matter in three different forms. In District No. 3 he travelled along one line part way towards the city and, changing at the junction, continued on the other line for some distance away from the city. In District No. 1 he selected two journeys. In the first he quitted one car before it had reached the end of its route,

entered another, and was carried in it to his destination. In the second he travelled in the same car past the point fixed by the company as the division between two routes, so that his journey began on one car-journey of the same car and ended on another. In the first two cases when he changed cars he was made to pay another twopence, and in the third, when the car passed from one of its routes to the other. His action failed in both Courts below, although in the Supreme Court of Judicature of Jamaica, from which this appeal comes, the Chief Justice delivered a dissentient opinion in his favour.

The defendants' power to charge depends on Section 26 of the license, which, so far as is material, runs as follows:—

"The licensees may demand, levy, receive, and take, in respect of the said tramways and the operation thereof, for every passenger travelling, and for any freight carried upon any of the cars and carriages of the tramways authorised by this license or any part thereof, the maximum tolls, fares, rates or charges mentioned and prescribed in Schedule B hereto, subject to the alteration of the same as herein provided."

The material part of Schedule B is:—

"The tolls, fares, and charges shall be as follows:—Passengers. For one journey between any two points in one district, 2*d*. For extra accommodation such sum as may be prescribed by rules made as aforesaid. If and whenever the several districts described in Schedule C shall, at the request of the licensees, be abolished with the sanction of the Governor in Privy Council, the charge for a ride as aforesaid shall be a sum not exceeding 3*d*. throughout the whole area. Provided that a passenger shall in respect of each fare be entitled, without further charge, but subject to such restrictions and conditions as shall from time to time be prescribed by the licensees and approved by the Governor in Privy Council, to one transfer from the line in which he may be riding to another line crossing the same for the purpose of completing his journey."

Their Lordships are of opinion that, upon the true construction of the above paragraph, the proviso applies only in the event of the abolition of the several districts, an event which has not occurred. The sequence and form of the sentences as well as the logical connection of the proviso with what precedes it lead clearly to this conclusion. Accordingly, as applied to this case, the charging words, combining Section 26 and Schedule B, together, are "the licensees may . . . take . . . for every passenger

travelling . . . upon any of the cars . . . for one journey between any two points in one district, 2*d*."

Evidently, if the meaning of "journey" in this sentence be once ascertained, all the rest follows. At the trial a transcript of the shorthand notes of the evidence and proceedings before the Privy Council, antecedent to the granting of the license, was tendered in evidence, and after objection was admitted by the Chief Justice "not for the purpose of contradicting the terms of the license" to quote the language of his judgment in the Court of Appeal, "but with the object of showing what was in the minds of the parties when the application for the license was under consideration." Their Lordships think that this evidence was inadmissible. There is no ambiguity about the word "journey" in the Schedule, though the construction of the sentence in which it occurs is very arguable. There is no evidence or contention that the word had any technical or acquired meaning different from that which it bears in common speech. The question is how it should be understood in connection with the other words among which it stands. This is purely a matter of construction. What was in the minds of the parties is not now *ad rem*. What was put into the license, which the Governor granted and the company accepted, has taken its place.

Their Lordships think that the language of that part of Schedule B, which deals with fares to be charged and transfers to be given when the separate districts shall have been abolished, may and indeed must be looked at for the purpose of collecting what is meant by "one journey between any two points in one district." The words treat the company's undertaking over the entire area as capable of being divided into several "lines," and contemplate that each "line" may be served by a separate series of cars. They provide for a charge of one fare for one "ride as aforesaid," which, in spite of the use of two different words for one and the same thing, evidently means "one journey between any two points" in the entire area; and they provide further, in relief of the passenger, that whereas that one fare would entitle him to conveyance over one line but not over another without payment of a further fare, the

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first fare shall suffice for his carriage in two cars by means of one transfer, which he is to have from the one line (that is the one car on one line) in which he may be riding to a car on another line crossing the first, the transfer being personal to himself and not available to any other person.

In this view the meaning of the words in question, which by themselves are fairly clear, is put beyond doubt. The journey is not the passenger's journey simply, which might include a transit on foot or by another conveyance at each end of the journey by car. It is both the journey of the passenger in relation to the car and the journey of the car in relation to the passenger; it is one journey of the passenger in one car. If he transfers himself to another car and so continues his journey by a second car or a third, he passes beyond the expressed limits of the right which he obtains for his 2d. His own particular journey or ride has then ceased to be one journey, in the sense of one journey of the passenger in one car, and has become another journey of the passenger in another car, and he must pay again. Furthermore, the identity of the car does not involve the unity of the journey any more than the identity of the passenger does. If the same car ends one journey and begins another, the passenger, though he continues to sit inside it, is no longer making one journey in one car but is making another journey in the same car. Were it otherwise he might go to and fro, or round and round all day on the same car for the same 2d. if such was the journey he fixed for himself.

The appellant strongly urged two points. First, it was said, what is the division into districts for unless it is to secure transit all over the district, between any two points, wherever situate within it, for one flat rate of 2d.? Next, it was said, "the schedule of maximum fares may be evaded and the public may be victimized at will, if the Company is to fix its own car routes and make each the subject of a separate fare of 2d. If it can select for itself any point on one line of rails, though not a junction or a terminus, and call it the end of one route and the beginning of another for the same car, why cannot it sub-divide its lines, street by street and corner by corner, and so multiply the collection of

fares without changing or even stopping the car?" In any case, if the division of the system effected by Schedule A into several tramways is enough to justify a division into corresponding routes for the running of cars, the short line of 1,050 feet, had it not been abandoned, would have justified a charge of 2d. by itself, though on other lines many times that distance might have been travelled for the same money.

The answer to the first point is that, on either view of the question in dispute, for the district a flat rate prevails, as distinguished from a mileage or distance rate. The difference is that riding over the system in the district is not so cheap on the one view as on the other. Further, while the flat rate is for the benefit of both parties, the division into districts appears to be for the Company's benefit, for it is at the Company's request and not at the instance of the public that it may be abolished. Hence in so far as the fare is made to depend on the district, this is a matter separate from the system of charging by flat rate, and is not involved in it.

To the second point the answer is, that this license does not seem to have been drafted to provide for extreme cases, and very naturally so. The restraints of good sense and self-interest are as efficacious in such matters as the letter of a schedule. The plaintiff's construction, pushed to extremity, would give him for one two-pence an extensive series of rides and changes, so long as his own will included them all in one journey, even though at each change he paused for such time as he might please for purposes of business or for rest, recreation or refreshment. Any such construction was disclaimed by counsel, but this was not because it transgressed the logic of the argument, but because it would pass the bounds of good sense. The like consideration applies to the attempt to reduce the Company's contention *ad absurdum*.

His Excellency the Governor in Privy Council possesses under the license extensive though defined powers in relation to the Tramway Company. Their Lordships are not now concerned to examine how far they would avail to prevent any preposterous action on the part of the Company, nor is any such event to be apprehended. It is sufficient to say that

those powers appear to be ample to prevent the necessity, such as sometimes arises, of giving a non-natural meaning to ordinary language in construing the provisions of Schedule B and of the license, in order to avoid some consequences of absurdity or injustice to which a natural construction would lead.

Their Lordships are of opinion that, in the circumstances of this case, the three two-penny fares in question were rightly charged, and that the decision of the majority in the Court below was right, and they will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

S. A. R.

Appeal dismissed.

A. I. R. 1914 Privy Council.

(FROM JAMAICA.)

29th July, 1914.

LORDS DUNEDIN, ATKINSON, SUMNER
AND JOSHUA WILLIAMS.

The West India Electric Company, Limited—Appellants

v.

The Attorney-General for Jamaica—Respondent.

Privy Council Appeal No. 130 of 1913.

(a) *Grant*—Grant of license to Electric Company to operate tramways in Kingston in Jamaica—Powers reserved to Governor, in nature of a derogation from the grant should be strictly construed—Generally the powers of such companies would include the right to determine the routes—In this case the Governor had no power to refuse to sanction time table unless the company accepted the right of the public to be carried for one fare between any two points in one district even though it might be necessary to change cars—Governor also was not entitled to dictate terms as to the fixing of the routes for giving effect to this claim of the public.

In the exercise of statutory powers the Governor in Privy Council of Jamaica granted to the appellants, (*The West India Electric Company, Limited*) the right to make and work certain tramways subject to the reservation of certain powers to himself. Virtually the license was a parliamentary bargain.

Held: that the powers reserved or given by Sections 13, 35 and 37 should be limited to the terms of those sections and anything that is necessarily implied by them. Because (1) these powers of regulation and control are in the nature of derogations from a grant; and (2) when undertakers, incorporated to make and work tramways, receive authority to carry on an undertaking, the good sense of the thing requires *prima facie* that

they should be masters in their own house and among other things should manage the tramcars. The power of "operating" the tramways, embraced the right to determine the routes of the different cars and their inter-relations. *Toronto Corporation v. Toronto Railway*, 1907 A.C. 324, Foll. [P. 292, C. 1 & 2.]

Held, further that the sections under which breaches of duty on the appellants' part can be dealt with, cannot be employed to obtain indirectly, what they do not authorise the Governor to obtain directly nor can the use or the refusal of the intervention which they provide for, be made the consideration for a bargain or the instrument for exerting pressure. It is not enough that the sections should be resorted to, *bona fide* for public reasons; they must be resorted to according to their terms and only for their expressed objects. [P. 293, C. 1.]

A question arose as to the right of the public, alleged by the respondent and denied by the company, to be carried for one fare between any two points in one district of the tramway system, even though it may be necessary to change cars for the purpose. On this, two claims were asserted by the Governor in Privy Council and disputed by the company.

He claimed to be entitled before approving the company's time-table, to make their acceptance of this claim of right in favour of the public a condition of his approval, and to be entitled to withhold it pending such acceptance, although under the license the time-table could not become effective till approved. He claimed also the right to insert in the time-table under the form of approving it, such alterations of car routes as he might think suitable for the purpose of attaining the same result or of giving effect to other contentions raised with regard to the company's obligations and the powers of the Executive under the license. These other contentions related to the running of "market cars."

Held, that these claims of the Governor were untenable. [P. 290, C. 1 & 2.]

(b) *Deed*—Construction—Tramway Company having power-house and tramways in parishes of Kingston and St. Andrew, entitled under license to refund of rates—Power-house subsequently removed to another parish without any express provision being made about refund of rates to be paid there—Such rates were held not liable to be refunded.

The license under which appellant company was working tramways in Kingston, in Jamaica, entitled the company to refund of rates paid by it. At the time the license was obtained their scheme contemplated a power-house and tramways all contained within the parishes of Kingston and St. Andrew. Afterwards the power-house was shifted to the parish of St. Catherine. In obtaining legislative sanction for this change in their undertaking the appellants did not procure the insertion of any words giving them any mode of recoupment for the rates, which were paid for their power-house and installation in the parish of St. Catherine.

Held, that the appellant was not entitled to recoupment of the rates paid in the parish of St. Catherine. [P. 293, C. 1.]

Lord Sumner :—This action was brought by the appellants The West India Electric Company, Limited, against the Attorney-General for Jamaica, as representing the Executive of the Colony, in order to settle various questions long in issue between the Company and the Government. Most of them relate to the interpretation of the Kingston and St. Andrew Tramway License, 1897, which is held by the Company, and to the character and extent of the control over the Company's undertaking which the Governor in Privy Council is entitled to exercise thereunder.

Accordingly, it is an action for a series of declarations of rights and liabilities. Some objection seems to have been taken at the hearing by the Attorney-General to the form or competence of the proceedings but it was not pressed. Their Lordships have no reason to think that the suit is defective either in form or substance, but in any case they are satisfied that no such objection is now open to the respondent in this appeal.

The chief declarations prayed for fall into two groups. The subject-matter of both is the right of the public, alleged by the respondent and denied by the Company, to be carried for one fare between any two points in one district of the tramway system, even though it may be necessary to change cars for the purpose. On this two claims were asserted by the Governor in Privy Council and disputed by the company.

He claimed to be entitled, before approving the Company's time-table, to make their acceptance of this claim of right in favour of the public a condition of his approval, and to be entitled to withhold it pending such acceptance, although under the License the time-table could not become effective till approved. He claimed also the right to insert in the time-table, under the form of approving it, such alterations of car routes as he might think suitable for the purpose of attaining the same result or of giving effect to other contentions raised with regard to the Company's obligations and the powers of the Executive under the License. These other contentions relate to the running of "market cars." There is a third question in controversy between the parties, which is wholly disconnected from any of the above and relates to the

rates on the Company's power-station. It may be dealt with separately.

The tramway system is the same as that dealt with in the Glen Campbell case already decided. The present action, indeed, had been begun before Mr. Glen Campbell raised in a concrete form the controversy about the right to transfers, which this case raises generally. It is therefore sufficient to refer to their Lordships' decision in that appeal for a description of the tramway system and for the grounds upon which they concluded in effect, that the appellants are right and the Attorney-General for Jamaica wrong in this controversy. Nevertheless, there is no reasonable objection in their Lordships' view to making a declaration of right upon this issue in the present action.

It follows that, throughout the dispute which went on from 1907 to 1912 between the Company and the Executive on the subject of time-tables and rules, the Governor in Privy Council was wrongly advised in asserting a right which that decision negatives, and in seeking to obtain from the Company their admission of that right and to give it practical effect *in invitoe*. The controversy, however, travelled beyond this issue. It is therefore necessary to give some account of its origin and development, and to consider at length the nature and extent of the functions of the Governor in Privy Council under the terms of the License.

The time-table of the tramway system involves three things, the routes on which the cars ply, the frequency with which they run on their respective routes, and the times at which they leave, pass, or arrive at particular spots on those routes. There was a time-table duly approved, which came into force in 1905. In many respects its routes followed, and in some they departed from the "tramways," enumerated in Schedule A attached to the License. In 1907 the company desired to alter this time-table, and a new one was submitted for the approval of the Governor in Privy Council. It was the subject of discussion and correspondence and was withdrawn. Another was substituted and also submitted for approval, and so on.

1912 came and still no approval had been obtained for a time table to supersede that of 1905, except that, in March, 1907, the Governor in Privy Council approved an altered time-table to take

effect for one month only. The objections and requirements of the Executive were substantially the following, (1) an offer to approve the proposed time-table . . . on condition that, if the company desired to cease to run Belt Line cars, they should "issue transfer tickets to enable every passenger to make any journey within one district on payment of one fare" (12th April, 1907). This was repeated in slightly different terms on 23rd October, 1911; (2) a claim to prescribe the routes, on which the cars should be run, which took several forms; first, the condition above quoted; second, a statement on 25th October, 1909, that "the Governor in Privy Council is not prepared to approve of any time-table, which does not by the arrangement of its routes secure to the members of the public their right under the License to be carried between any two points in one district for one fare"; third, an intimation, dated 23rd October, 1911, that "His Excellency proposes . . . to make in Council rules as to the time for the licensees to run passenger cars on the following basis:— . . . (6) Avenue line. Service as at present. Two cars starting every 24 minutes from Victoria Market to run in a belt." The same proposal included other paragraphs, "directing cars to be operated on more than one tramway," as the appellants describe them, which need not be set out in full; fourth, a notice, dated 5th February, 1912, that "the Governor in Privy Council would be prepared to approve of a time-table on the lines of that submitted . . . on condition that the East Street belt line is either maintained as a circular route, or arranged to begin and end at Cross Roads." His Excellency on 7th February, 1912, declined to waive this condition.

There is a similar dispute with regard to "market cars," a particular kind of vehicle which, by Section 13 of the License, the appellants are bound to operate "on such portions of the tramways and at such times as the Governor in Privy Council shall from time to time approve or direct," and as to which, by Section 37, "the Governor in Privy Council may from time to time make, alter, and amend rules . . . (2) as to the market cars, regulating them, and the time of their departure (subject to

Clause 13 hereof)." On 20th February, 1912, a rule was made which prescribed, among other things, that "market cars shall leave Papine at 6 A. M. and 8 A. M. daily, and proceed to the Victoria Market," a route which involves running cars over several of the tramways named in the License, and out of one district into another.

The substance of the appellants' objection to these requirements of the Executive is that His Excellency ought to approve or disapprove a time-table upon its merits within a reasonable time of its being submitted to him; that he is not entitled, under colour of his powers of approving time-tables or of making market car regulations under the License, to endeavour to secure for the public, either by negotiations or by indefinitely withholding his decision, advantages which the appellants are not compellable by law to give and in the interests of their shareholders are not minded to grant; and that he is not entitled under the like colour to interfere with or to prescribe the routes upon which the appellants *bona fide* think fit to run and operate their cars.

It has been questioned before their Lordships whether any occasion has arisen for declarations of the kind desired, the appellants having, both in correspondence and in their pleadings, based their argument as to routes on the supposition that specific tramways or routes are definitely fixed by the License and Schedule, and the Governor, on the other hand, having, at one time at least, disclaimed any right to interfere with the routes of the cars. This disclaimer, however, took place as long ago as September, 1907, and since then, sometimes directly, sometimes indirectly, but evidently of set purpose, the Governor has endeavoured to prescribe routes, either by refusing approval on the ground that the time-table submitted breaks up a former continuous route, or by requiring that cars should be run on routes of his selection as a condition of his approval. The market rule of 1912, made a few weeks before the commencement of this action, formally and in terms prescribed a route on which through market cars should run.

It is true that the appellants in argument before their Lordships declined any longer to rest this part of their case

on the provisions as to particular tramways contained in Section 9 and Schedule A of the License, as they do in the first declaration asked for in the prayer to their statement of complaint. If their Lordships had been of opinion that the Governor's attitude was strictly based upon this contention about Schedule A, and would have been different if the case had been presented to him as it has been to their Lordships, they would not have thought fit to deal with this part of the case at all. Their Lordships do not think that the course taken by the Governor was based simply on opposition to this contention, which the company have now dropped. At the very outset, on 1st July, 1907, the appellants wrote to the Governor:—"The Government has no power to dictate the routes over which any particular service of cars should be given. Schedule A of the License defines and describes the company's statutory obligation in this respect, and any arrangement whereby the routes defined by that schedule of the License, are extended or made to overlap or interlap is a matter solely within the discretion of the company." It was in answer to this lucid contention that the Governor sent the disclaimer above-mentioned, which has since been abandoned. Their Lordships are therefore of opinion that the appellants are not disentitled to have this matter dealt with on this appeal, and it is to be hoped that, the more matters of real controversy can now be finally settled, the greater is the likelihood of good relations prevailing between the owners of the tramway and the Executive, which only seeks to know its powers and the measure of its public duty.

There is no question here of paramount emergency or of necessity of state. In the exercise of statutory powers the Governor in Privy Council has granted to the appellants the right to make and work tramways subject to the reservation of certain powers to himself. Virtually the License is a parliamentary bargain the terms of which have to be construed. There are two reasons why the powers reserved or given by Sections 13, 35 and 37 should be limited to the terms of those sections and anything that is necessarily implied by them. One is that these powers of regulation and control

are in the nature of derogations from a grant; the other is that, when undertakers, incorporated to make and work tramways, receive authority to carry on an undertaking, the good sense of the thing requires *prima facie* that they should be masters in their own house and among other things should manage the tramcars, which they are certainly more likely to do well than is His Excellency in Privy Council. As Lord Collins says in *Toronto Corporation v. Toronto Railway* (1), where, as in the present case, the tramways company had been given the power of "operating" the tramways, "whatever else the word 'operating' may include it seems to their Lordships most certainly to embrace the right to determine the routes of the different cars and their inter-relations. This seems to lie at the root of successful management of the enterprise and ought to be in the hands of those who are responsible for getting the best monetary return out of it." Reading together Sections 13 and 37 it will be seen that the power to "approve or direct" the "operation" of market cars is exercisable by making "rules regulating them and the time of their departure." The words in Section 13, most relied on by counsel for the respondent, *viz.*, "on such portions of the tramways . . . as the Governor shall . . . direct," must therefore correspond to and fall within the words "regulating them" in Section 37 (2), and in the opinion of their Lordships are not such as to express a clear power to prescribe the route of the market car and to fix its starting point and the end of its journey, which is what the regulation of 1912 purports to do. A derogation so large from the appellants' enjoyment of their grant and management of their own affairs is not in their Lordships' opinion to be found in the sections in question. So too Section 35 (to which Section 37 (3) is ancillary) is limited to time tables as the subject-matter, to approval as the Governor's function, and, as his power of interference, to alteration so as to obtain a ten minutes' service at certain places and times of day by acceleration or by addition of cars. Their Lordships deal only with these sections. They are not concerned to interpret the other

(1) [1907] A. C. 324.

sections, under which breaches of duty on the appellants' part can be dealt with, or to define the other powers, which the Executive may have, for preventing abuses and protecting the public. It is enough to add that these sections cannot be employed to obtain indirectly what they do not authorise the Governor to do directly, nor can the use or the refusal of the intervention, which they provide for, be made the consideration for a bargain or the instrument for exerting pressure. It is not enough that the sections should be resorted to, as they doubtless were and must be *bona fide* for public reasons; they must be resorted to according to their terms and only for their expressed objects.

A separate question is raised in this appeal, unconnected with the powers of the Executive or the operation of the Tramways. When the appellants were incorporated by Law 33 of 1897, and obtained the License, their scheme contemplated a power-house and tramways, all contained within the parishes of Kingston and St. Andrew. Section 20 (b) of the License provided that "the licensees shall, as and by way of return to the road authorities for the use of their streets and roads, pay into the public treasury a sum of money equal to 4 per cent. of the gross receipts of their undertaking; any sum so lodged shall be applied in repaying to the licensees all rates and taxes, the proceeds of which are devoted to parochial purposes, except water rates, which shall have been paid by them during the preceding six months, and the balance shall be divided by the Governor in Privy Council between the several road authorities over or along or across whose streets or roads the licensees run their cars." It was afterwards found that the Rio Cobre, in the parish of St. Catherine, afforded a favourable site for generating electric current by water power, and accordingly the actual power-house is now erected in that parish at a spot twenty-one miles from the parishes of Kingston and St. Andrew. In obtaining legislative sanction for this change in their undertaking under Section 5 of Law 38 of 1898, the appellants did not procure the insertion of any words bearing upon Section 20 of their license, or giving them any mode of recoupment for the rates, which of course they pay for their power-

house and installation in the parish of St. Catherine. They now allege that these rates come within the words of Section 20 of the License, "all rates . . . which shall have been paid by them during the preceding six months," and that the amount of them must therefore be added to the moneys, which the public treasury refunds to them out of the sum, which they lodge in the treasury under the section. The Attorney-General for Jamaica contests this on the grounds that no part of the undertaking was at the time of the License intended to be or authorised to be created outside the parishes of Kingston and St. Andrew; that the words in Section 20 (b), "the several road authorities over or along or across whose streets or roads the licensees run their cars" (which road authorities do not include the parish of St. Catherine), make it plain that all that is intended is a refund of the rates paid to the parishes of Kingston and St. Andrew out of the sum lodged in the treasury, "as and by way of return to the road authorities for the use of their roads"; and that an application of the clause to St. Catherine's rates could only be authorised if the Act of 1898 had contained words appropriate to extend it, at the time when the powers of selecting a site for the generating station were extended.

The contention of the appellants claims too much. Their powers were extended in 1898 by Law 35 of that year, Section 1, to the "transaction of any business necessary or incidental to any of the purposes of this company." Whatever buildings they might erect or whatever works they might construct in Jamaica in execution of their extended powers would be locally rateable, and even though they had no connection either with generating power for their Kingston tramways or with operating them, they would, on the appellants' construction of the words "all rates . . . which shall have been paid by them," lead to a further deduction in diminution of the rent payable by the appellants for the use of the roads in Kingston and St. Andrew's parishes. This the appellants disclaim, but the disclaimer is politic not logical. To avoid a *reductio ad absurdum* they virtually have to amend Section 20 (b) of their License by inserting words, which would make it read "all rates and taxes . . . which shall have been as-

sessed on their tramways undertaking, or any part thereof, and paid by them during the preceding six months."

On the other hand the scheme of Section 20 is this: The appellants use the roads in the parishes of Kingston and St. Andrew, in which they are rate payers in respect of their lines and works, a good deal more than ordinary rate-payers do; accordingly they are to pay rent for a way-leave and that rent is to be in respect of their excess user over that to which they would be entitled as simple rate-payers or as members of the public. The rent is a percentage on their gross receipts without even first deducting rates paid. Rates must be paid at one time and annual gross receipts may be ascertainable at another, and conceivably the rates paid may equal or exceed 4 per cent. on the gross receipts for the year selected. To avoid claims for return of money overpaid, the machinery adopted is payment into the treasury of 4 per cent. on the gross receipts, with a subsequent refund of a sum equal to the amount of rates paid, and an appropriation of the balance, if any, among the road authorities. This shows that the equalisation intended is between rates paid to the parishes of Kingston and St. Andrew and a rent for way-leaves, measured by the excess of 4 per cent. of the company's gross receipts over such rates, if any, and payable also to the same parishes, as being the road authorities. It is true that if, as was originally intended, the appellants had erected their power-house in Kingston parish or St. Andrew's, the amount of the rates thereon would have been added to the sum to be refunded to them out of the treasury under Section 20 (b) of the License, but if they do not erect the power-house there they pay no rates on it there, and accordingly get no deduction or refund in respect of it. When for their own purposes they sought powers to erect it in St. Catherine's parish, it was their business, if they wished to bring the St. Catherine's rates under Section 20 (b) to have procured the insertion of words for the purpose.

Between these conflicting arguments their Lordships are of opinion that the latter is right, and that in the result the appellants' action was rightly dismissed upon the subordinate issue as to the

St. Catherine's parish rates, but otherwise should have succeeded. The only relief claimed was by way of declarations of rights, and their Lordships think that the following declarations should have been made:—

(a) That the plaintiff company has the right under the License, as well in respect of market cars as of ordinary passenger cars, to charge each passenger for one journey by any one car between any two points on its regular route in one district, a fare not exceeding 2d. in the case of cars other than market cars, and not exceeding three-fourths of the ordinary passenger tariff in the case of market cars, and is not under obligation to run any of its cars over more than one of the routes, which it fixes by public announcement, or to give transfers or transfer tickets.

(b) That the Governor in Privy Council is not entitled under Section 35 of the License to withhold consideration of a time-table submitted to him or to refuse approval of it on the grounds only that it does not provide for the running of through cars or for the running of cars on any particular route, or on the ground only that the plaintiff company refuse to give transfers or transfer tickets.

(c) That the Governor in Privy Council is not entitled under Section 13 and Section 37 (2) of the License, or either of them, to withhold consideration of a time-table for market cars submitted to him, or to refuse approval of it, only on the grounds mentioned in declaration (b).

(d) That the Governor in Privy Council is not entitled, either in respect of ordinary passenger cars or of market cars, to make the exercise of his powers under Sections 13, 35 or 37 of the License respectively, conditional upon the plaintiff company's running cars on a route indicated by him, or to refuse to exercise them unless the plaintiff company agree to run cars on a route indicated by him, or to prescribe or require that cars shall start from or run to any points or proceed by any route prescribed by him, as a condition of or as part of the exercise of his powers thereunder.

(e) That the rule respecting market cars, dated 20th February, 1912, is *ultra vires* so far as it imposes on the plaintiff company the route which their cars are to follow.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed with costs, that the judgments of the Supreme Court of Jamaica entered on 11th September, 1913, and the judgment of the Chief Justice of Jamaica in favour of the defendant, dated 30th May, 1913, which it affirmed, be set aside, save in so far as they refused to make declaration (K), and decided against the plaintiff's claim to deduct the St. Catherine's parish rates and that judgment be entered for the plaintiffs in the action for the aforesaid declarations, with costs in both Courts.

S. A. R. *Appeal partly allowed.*

A. I. R. 1914 Privy Council.

(FROM ALLAHABAD).

24th April 1914.

LORDS MOULTON AND PARKER OF
WADDINGTON, SIR JOHN EDGE AND
MR. AMEER ALI.

Ram Sewak and others—Appellants

v.

Jagannath—Respondent.

Privy Council Appeal No. 115 of 1913.

Allahabad Appeal No. 15 of 1912.

(a) *Hindu Law—Alienation by widow, to pay prior debts—Nature of debts which is usually mentioned facilitates proof of necessity.*

When a person is lending money to a Hindu widow to pay off prior debts, their nature is almost invariably recited in the bond. Such recital very much facilitates proof, the necessity of which the lender himself always anticipates.

[P. 295, C. 2.]

(b) *Hindu Law—Alienation by widow to pay off prior mortgage by another limited owner—Prior mortgage must be shown to be for necessity.*

Where an alienation by widow is alleged to be made to pay off a prior mortgage by another prior limited owner, the prior mortgage must itself be one for necessity.

[P. 295, C. 2.]

The judgment of the High Court of Allahabad (Richards, C. J. and Bannerji, J.) was delivered on 7th February, 1912; The appeal was allowed and therefore an appeal was preferred to the Privy Council. The judgment of the High Court was as follows:—

This appeal arises out of a suit on foot of a mortgage, dated the 23rd of November, 1886. The mortgage was made by one Mst. Raj Kunwar the widow of Mota Din. The principal amount secured by the mortgage was Rs. 6,500. At the date when the suit was instituted no less than Rs. 22,101 were due for principal and interest. The plaintiff however only claimed Rs. 11,000.

The defendants amongst other defences pleaded that there was no legal necessity for the loan.

The learned Subordinate Judge in referring to this issue says "I must say that the evidence of legal necessity is meagre general and not very convincing."

The bond being made by a Hindu widow it lay upon the plaintiffs to show that there was legal necessity for the loan. So far as the evidence goes there is nothing to show that Mst. Raj Kunwar was left unprovided for. On the contrary she appears to have had some 16 villages which were apparently unincumbered some possibly for a mortgage made by another widow named Mst. Kastori, to which we shall presently refer. The mortgage itself will be found at page 19 of the appellants book. It recites that she is making the mortgage in order to pay off a debt due by her husband's elder brother's wife Mst. Kastori, and also to pay debts due by herself. It is particularly to be noticed here that there is no mention of any prior mortgages whatsoever. It is proved by the evidence that there was a mortgage by Mst. Kastori, dated the 25th of November, 1881 to secure the sum of Rs. 2,000 but the bond speaks of a debt due by Mst. Kastori and not of a mortgage by her. The absence of all mention of the bonds is not without significance. When a person is lending money to a Hindu widow to pay off prior debts, their nature is almost invariably recited in the bond. Such recital very much facilitates proof, the necessity of which the lender himself always anticipates. Assuming for a moment that the bond was given in part to pay off a mortgage of Mst. Kastori there is no evidence whatever to show that Mst. Kastori who was herself a Hindu widow with limited interest had any legal necessity for raising the loan.

It is next said that the loan was in part taken to discharge two other mortgages, one, dated the 11th of January, 1883 and the other 16th of July, 1885, to secure Rs. 3,000 and Rs. 2,800 respectively. These bonds were made in favour of one Khushali. Again we must draw attention to the fact that there is no mention of these bonds in the bond in suit. The amount of money raised would not be sufficient to anything like discharge the principal and interest due on these bonds and as a matter of fact there is nothing whatever to connect the bond in suit with the bonds of the 11th of January, 1883 and the 16th of July, 1885, except the oral evidence of certain witnesses produced by the plaintiffs. Evidently the learned Judge from the passage in his judgment, which we have quoted, placed the smallest possible reliance upon oral evidence. We have considered the evidence of the witnesses in chief and in cross-examination, and we can place no reliance whatever upon it. It is vague and unconvincing and the evidence of the several witnesses is not consistent one with the other. So far as it goes it is to the effect that the loan was raised for the purpose of settling and discharging all the liability of Mst. Raj Kunwar to Khushali in whose favour all the 3 bonds namely the bond of the 25th of November, 1881, the bond of the 11th of January, 1883 and the bond of 16th of July, 1885, were. The learned Subordinate Judge assumes that the bond in question was given to dis-

charge these 3 mortgages, and it is here we think that he went wrong. Even assuming that the bond sued upon was given to discharge in part at least these bonds, he says that Dwarka Das, who succeeded *Mst. Raj Kunwar*, recognised the validity of the bond of the 8th of January, 1883 and the bond of the 16th of July, 1885, because he actually discharged them. It is quite true that Dwarka Das succeeded to the property on the death of *Mst. Raj Kunwar*. It is also true that he in fact discharged the two bonds of the 11th of January, 1883 and the 16th of July, 1885. We need hardly say it does not follow that because Dwarka Das discharged these bonds that the loan in favour of the plaintiffs was raised for the same purpose. In fact if the loan which was raised on the plaintiffs mortgage discharged these bonds there would be no necessity for Dwarka Das to subsequently pay them off. It is said that the loan only discharged the principal and interest on foot of *Kastori's* bond and the interest due upon the two later bonds. We have only to point out that this is mere surmise. There is no evidence of any witness that the loan was raised for the purpose of discharging principal and interest on the first bond and the interest on

the later ones and again we may point out that there is not a word to this effect in the bond itself. The claim itself is somewhat suspicious. It is entirely unexplained why it was that no suit was brought until within two days of the expiration of the two years grace allowed by the Limitation Act of 1908. The fact the plaintiffs waited till the amount due had swelled to the enormous sum which we have already mentioned, probably far exceeding the value of the property suggests that the bond may have been discharged. In our opinion the plaintiffs failed to show that the loan was taken for legal necessity.

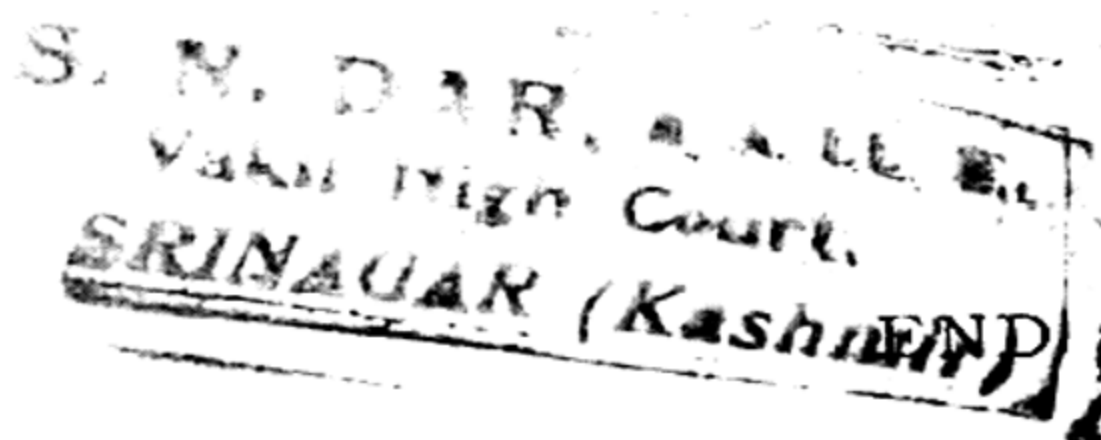
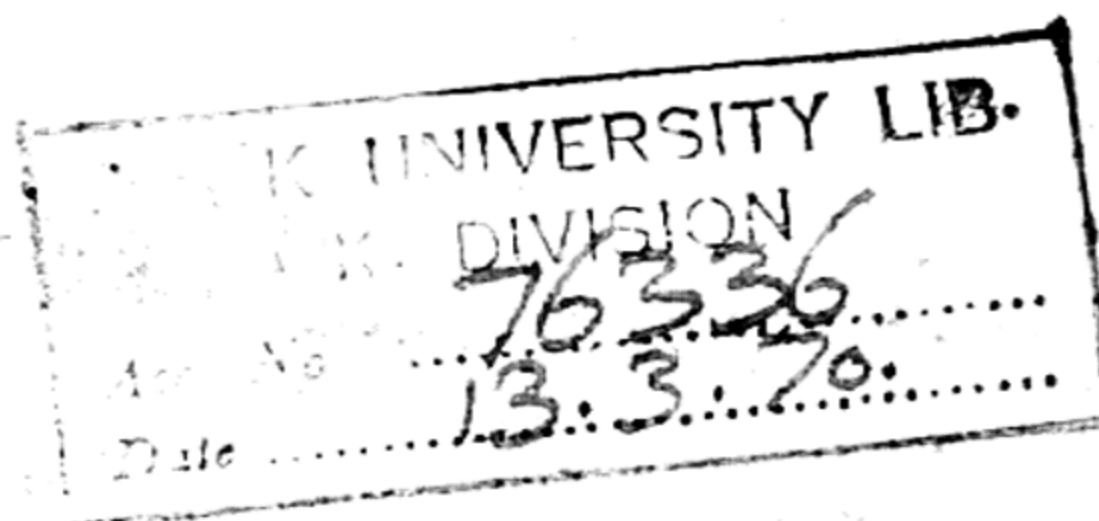
We accordingly allow the appeal, set aside the decree of the learned Subordinate Judge, and dismiss the suit with costs in both Courts including in this Court fees on the higher scale.

The decision of the Privy Council was as follows:—

Lord Moulton:— Their Lordships will humbly advise His Majesty that this appeal ought to be dismissed with costs.

D. D.

Appeal dismissed.



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S. N. DAD B. A., LL. B.
Vakil H. [REDACTED] Agent